4. GENERALIZED OR SUSPICIONLESS SEARCHES

4.1. Introduction and Overview.

Given the serious security and discipline problems that exist in a number of school districts, many education professionals believe that it is appropriate and even necessary to conduct routine searches that are not based upon a suspicion that a particular, identified student has committed an offense or violation of the school rules. These suspicionless searches or inspection programs are sometimes referred to as "sweep," "dragnet," or "blanket" searches.

It should be noted that this portion of the Manual includes a detailed discussion concerning the use of drug-detection dogs, see Chapter 4.5, since schoolwide canine sweeps are often characterized as a form of generalized, suspicionless or "blanket" search. However, once a drug-detection canine alerts to the presence of drugs in a particular locker or other location, the ensuing act of opening the locker constitutes an individualized, suspicion-based search.

Suspicionless searches are not designed to facilitate the taking into custody or prosecution of student offenders, but rather serve to *prevent* students from bringing or keeping dangerous weapons, drugs, alcohol, and other prohibited items on school grounds. These inspection programs, in other words, are intended to send a clear message to students that certain types of behavior will not be tolerated. These programs discourage inappropriate conduct by enhancing the risk that those who violate the law or school rules will be detected and will thereupon be subject to appropriate discipline or even criminal prosecution. It is somewhat ironic that by sending this message, school officials hope to minimize the likelihood that drugs or dangerous weapons will actually be discovered in the course of a sweep search.

Some of these generalized or suspicionless searches are conducted by school officials acting entirely on their own authority, without any assistance from a law enforcement agency. In those circumstances, the law enforcement role might be as limited as providing drug and weapons recognition training to those school officials who will conduct the inspections. However, a law enforcement officer would neither direct nor actually participate in the searching conduct.

It is critical to note that where a law enforcement agency does participate in the search, for example, by providing the services of a drug-detection canine, the rules governing the legality of the search could be quite different. The procedures for conducting searches involving active or even passive law enforcement participation are

discussed in Chapter 4.5D(4), which deals specifically with the use of drug-detection canines.

This Manual offers several different options for school officials who desire to implement some form of suspicionless inspection program. Some of these options are likely to be more effective than others in discouraging students from bringing or keeping drugs, alcohol, weapons, and other prohibited items on to school grounds. Certain options discussed in this Chapter are also more efficient in terms of the use of limited personnel resources that may be available to a school district. By the same token, however, some options, while demonstrably effective, may pose a greater risk of a successful legal challenge, especially because the state of the law remains unsettled. (As a general proposition, the greater the involvement or participation of a law enforcement agency in the search, the greater the likelihood that the law enforcement involvement will trigger stricter rules and subject the entire inspection program to enhanced scrutiny by the courts.)

For this reason, school officials must balance the risks and benefits of any suspicionless search policy, and should carefully select the most appropriate option or options that are discussed in this Manual. Note, moreover, that the options presented in this Manual are not mutually exclusive and, in fact, it would be prudent for school administrators to develop a comprehensive security program that may include several if not all of these options.

Because all legal challenges will turn on the individual facts of the case presented to the court, the so-called "attending circumstances," a search policy that is perfectly suitable for one school district facing certain problems may be less suitable or even unreasonable if undertaken by a different school district or building facing less severe problems. The use of drug-detection canines, for example, may be appropriate in a high school with a known drug problem. The same tactic, however, would probably be inappropriate in the context of an elementary school in the same district (other than as a "show-and-tell" demonstration in an assembly). For this reason, throughout this Manual, school authorities are strongly encouraged to make specific "findings" that justify the district's course of action and that can be reviewed and relied upon by a court in the event that the policy is challenged by a student or parent on constitutional grounds.

4.2. Legal Standards and History.

The landmark T.L.O. case involved a search of the handbag of a student who was suspected of committing a school infraction. The case did not address directly the

question whether and under what circumstances school officials may search a locker or other property where there is no particularized suspicion to believe that evidence of a crime or school rule infraction would be found in the specific location to be searched.

Indeed, the United States Supreme Court in T.L.O. expressly declined to issue any firm ruling on the legality of such a suspicionless search. The Court noted that:

> We do not decide whether individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities. In other contexts, however, we have held that although "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure [,] ... [t]he Fourth Amendment imposes no irreducible requirement of such suspicion." ... Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by the search are minimal and where "other safeguards" are available "to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'" ... Because the search of T.L.O.'s purse was based upon an individualized suspicion that she had violated school rules ... we need not consider the circumstances that might justify school authorities in conducting searches unsupported by individualized suspicion.
> [105 S.Ct. 733, n.8 (citations omitted).]

Although the United States Supreme Court in T.L.O. expressly declined to consider whether and under what circumstances a search could be conducted lawfully in the absence of an individualized suspicion, the question was addressed, if only in dicta, in a companion case to T.L.O. that was decided by the New Jersey Supreme Court: State v. Engerud, 94 N.J. 331 (1983). (The companion case involving Engerud was not reviewed by the United States Supreme Court and thus was not affected by the United States Supreme Court's decision in New Jersey v. T.L.O.. Accordingly, Engerud continues to be controlling precedent in New Jersey.)

The Engerud case involved a search of a student's locker. The search in that case was not part of a random inspection program, but rather was based on an individualized suspicion that Engerud was selling drugs in the school. (The New Jersey Supreme Court ultimately ruled that because the suspicion in that case was based only upon an "anonymous tip," the school official who conducted the search "lacked the necessary factual predicate for a reasonable ground to believe that his [Engerud's] locker contained evidence ..." 94 N.J. at 348.) Even though the search in that case was based on a particularized (albeit inadequate) suspicion that Engerud was dealing drugs, the New

Jersey Supreme Court in its discussion of whether Engerud enjoyed an "expectation of privacy" in his locker observed that, "[h]ad the school carried out a policy of regularly inspecting students' lockers, an expectation of privacy might not have arisen." 94 N.J. at 349 (citations to New York authority omitted).

It is not clear why the Court included this cryptic phrase, since the Somerville High School had no such policy. The Court's observation therefore had no direct bearing on the outcome of the case. (Lawyers sometimes refer to such tantalizing observations as "dicta."). It appears that the Court was suggesting an alternative strategy that school officials could use to respond to the growing problem of crime and drugs in the schoolhouse.

Based on this language, an argument could be made that had the school implemented such a policy of regularly inspecting students' lockers, and if as a consequence of that policy Engerud had no reasonable expectation of privacy, then it would appear that the Fourth Amendment would have provided him with *no protection*. In that event, so the argument goes, *any* search of his locker conducted by school officials, even if unsupported by facts constituting reasonable grounds, would be permitted.

A similar argument was actually accepted by the Wisconsin Supreme Court in In the Interest of Isiah B., 500 N.W.2d 639, 641 (Wis. 1993). In that case, the school had adopted a written policy retaining ownership and possessory control of school lockers. Students were advised not only that the lockers are the property of the school, but also that lockers could be inspected by school officials "for any reason at any time." Id. at 639, n.1.

The majority of the Wisconsin Supreme Court accepted the prosecutor's argument that in light of the school district's policy, the student charged in that case with possession of a firearm and cocaine found during a general locker inspection had no reasonable expectation of privacy in his locker, and, thus, no "search" for Fourth Amendment purposes took place. Id. at 641. The majority of the Wisconsin Supreme Court expressly rejected the defendant's argument that school officials were required under the Fourth Amendment "to promulgate and conform to written guidelines governing locker searches." Id. at 641, n.3. Because the majority had concluded that the student had no reasonable expectation of privacy in his locker, they essentially held that school district officials were not at all constrained by the Fourth Amendment, and thus could, just as the school's announced policy declared, open this or any other student's locker at any time and for any reason.

The dissent, following on a long line of precedent, reached a decidedly different conclusion, observing:

> While notice that a locker may be searched might diminish the reasonableness of a student's expectation that items stored there will be kept secret, numerous courts have repeatedly stated that a government proclamation cannot eradicate Fourth Amendment rights. "The government could not avoid the restrictions of the Fourth Amendment by notifying the public that all telephone lines would be tapped, or that all homes would be searched." The school's ownership or partial control of the lockers cannot negate the students' expectation of privacy in the contents of the lockers. [500 N.W.2d at 645 (Abrahamson, J., concurring and dissenting) (citation to quoted authority and footnote omitted).]

It is unlikely that the New Jersey Supreme Court would follow the lead of the Wisconsin Supreme Court and accept the argument that school officials can adopt and announce a policy that effectively and completely extinguishes students' reasonable expectations of privacy in their lockers so that the Fourth Amendment simply does not apply, notwithstanding the dicta in the Engerud case. Indeed, if this argument were to be carried to its logical extreme, then it would seem that police officers as well as school officials would be permitted to search these lockers on a whim and for no reason at all. Rather, it is more likely that New Jersey courts will take a middle ground, permitting school officials to conduct general searches of lockers, but requiring them first to document the need to employ such tactics, and then to establish and follow neutral criteria to make certain that the power to search is not abused and is exercised in a reasonable fashion.

In sum, the better approach is to assume that courts in this state will only tolerate searches that are undertaken by school officials who are acting independently of law enforcement and that are actually conducted in accordance with and pursuant to any such "policy of regularly inspecting students' lockers." In other words, the fact that a school adopts a routine inspection policy or program does not mean that school officials can thereafter conduct any searches they want, without regard to individualized suspicion or some neutral plan (i.e., random inspections). Were it otherwise, schools could circumvent and all but emasculate the specific rule established in New Jersey v. T.L.O. by simply adopting a pervasive search policy. It is unlikely that the New Jersey Supreme Court meant to imply in Engerud that otherwise unconstitutional searches will be permitted so long as they are conducted routinely. Indeed, that conclusion would stand the constitutional protection against unreasonable searches and seizures on its head.

Two years after Engerud was decided and shortly after the United States Supreme Court announced its landmark decision in T.L.O., the New Jersey Legislature seized upon the above-quoted dicta in the Engerud decision, adopting a law now codified at N.J.S.A. 18A:36-19.2. That law provides that:

> The principal or other official designated by the local Board of Education may inspect lockers or other storage facilities provided for use by students so long as students are informed in writing at the beginning of the school year that inspections may occur.

The Assembly Education Committee's statement to the bill that eventually became N.J.S.A. 18A:36-19.2 explained that:

> In a recent decision, the New Jersey Supreme Court held that a search of a high school student's locker by school officials was improper because "in the context of this case the student had an expectation of privacy in the contents of his locker." Later in the opinion, the Court stated, "[h]ad the school carried out a policy of regularly inspecting students' lockers, an expectation of privacy might have not arisen."
>
> This bill clarifies the situation and permits boards of education to provide for inspection of students in a manner consistent with the New Jersey Supreme Court's ruling in State v. Engerud, 94 N.J. 331 (1983), decided August 8, 1983.

The question that logically arises is whether and to what extent school officials can rely on the specific authorization set forth in N.J.S.A. 18A:36-19.2 to develop a locker inspection program. Obviously, a statute cannot authorize conduct that violates the Constitution, since the State and Federal Constitutions establish minimum standards of privacy protections for all citizens, including schoolchildren. In other words, while a statute can afford citizens, including students, greater protections than are provided by the Constitution, it cannot work to authorize governmental actions that would otherwise be unconstitutional.

However, a statute can be extremely useful in authorizing so-called "administrative" health and safety inspection. (The utility of these so-called "administrative" searches, as opposed to criminal investigation searches, is described in Chapter 2.11.) Compare N.J.S.A. 30:4C-12, which authorizes Division of Youth and Family Services' (DYFS) workers to apply to a court for an order compelling parental cooperation to an in-home investigation — the functional equivalent of a "search" — concerning possible

child abuse or neglect. See also New Jersey Div. of Youth & Family Serv. v. Wunnenberg, 167 N.J. Super. 578 (App. Div. 1979), which upheld such in-home DYFS inspections as valid administrative searches.

As importantly, the locker inspection statute adopted by the New Jersey Legislature is both relevant and helpful in explaining what constitutes a "reasonable expectation of privacy," that is, a subjective expectation of privacy that society is prepared to accept as reasonable. This is so because the legislative pronouncement presumably reflects the will and understanding of the general public, and puts all citizens on clear notice.

N.J.S.A. 18A:36-19.2 was obviously intended to explain when and under what circumstances students would be deemed to have lost any reasonable expectation of privacy in the contents of their lockers. By the same token, the Legislature appears to have openly declared that regular locker inspections are a reasonable means by which school officials can protect the safety and security of schoolchildren and other members of the school community. Recall in this regard that ultimately, the legality of any search conducted by school officials depends upon the *reasonableness* of the search, considering all of the circumstances and balancing all of the competing rights and interests involved.

In 1989, the United States Supreme Court decided two landmark Fourth Amendment cases involving random drug testing of certain private railroad workers and federal Customs Service employees. See Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989), and National Treasury Employees Union v. Von Raab, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989). Under the Skinner/Von Raab line of cases, a suspicionless search may be permissible when the search serves "special needs, beyond the normal need for law enforcement." Skinner, supra, 489 U.S. at 619, 109 S.Ct. __, 103 L.Ed.2d at 661. "In limited circumstances," the United States Supreme Court observed, "where the privacy interests implicated by the search are minimal, and where an important government interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." Id. at 624, 109 S.Ct. at 1417, 103 L.Ed.2d at 664. Most recently, the United States Supreme Court in Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995), applied this principle to sustain the constitutionality of random, suspicionless drug testing of high school students participating in interscholastic athletic competitions. (See Chapter 13 for a more detailed discussion of drug testing.)

In late September 1997, Chief Justice Deborah Poritz, writing for a unanimous New Jersey Supreme Court, found that the "special needs" test established in the

Skinner/Von Raab line of federal cases "provides a useful analytical framework for considering the protections afforded by Article I, Paragraph 7 of the New Jersey Constitution... ." New Jersey Transit PBA Local 304 v. New Jersey Transit, 151 N.J. 531, 556 (1997). The Court in that case thus flatly rejected the argument that the State Constitution's guarantee against unreasonable searches precludes a police drug-testing program that did not require a particularized suspicion before an officer can be ordered to submit to a drug test. In embracing the "special needs" exception to the general rule that searches must be predicated upon an individualized suspicion, Chief Justice Poritz found that the analytical approach used by the United States Supreme Court "enables a court to take into account the complex factors relevant in each case and to balance those factors in such manner as to ensure that the right against unreasonable searches and seizures is adequately protected." Id. at 556.

The United States Supreme Court and other courts have noted that several factors bear upon the reasonableness of the suspicionless search at issue. These factors include: (1) the relevancy of the incidence of detection; (2) a showing of the prior demonstrated need for the search; and (3) the role of less restrictive or intrusive alternatives. See Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 115 S.Ct. 2386, 2395, 132 L.Ed 2d. 564, 580 (1995).

The first of these factors, the incidence of detection, simply refers to the likelihood that an inspection program will reveal evidence of crime. As a general proposition, when the incidence of detection of criminal behavior is low in proportion to the number of persons who are subjected to the search, the policy is more subject to criticism. However, given the deterrent objective of a school-based locker detection program (which is designed principally to discourage students from bringing drugs and weapons on to school property) and given the serious risks posed to students' well-being in the educational environment of a school, it should not be a problem that locker inspection programs only infrequently reveal evidence of criminal activity.

In Commonwealth v. Cass, 709 A.2d 350 (Pa. 1998), the Pennsylvania Supreme Court sustained the legality of a drug-dog search of student lockers because school officials had articulated reasonable grounds for believing that drugs would likely be found on school property among the students' paraphernalia commonly brought to school and normally keep within their lockers. Id. at 362, n. 13. The analysis of the Pennsylvania Supreme Court thus suggests that when making findings to justify a general search program, school officials should meet the basic T.L.O. "reasonable grounds" standard, although in the context of a general schoolwide search, school officials need not have reasonable grounds to believe that drugs or other prohibited items would be found in any particular location. The Pennsylvania Supreme Court concluded

that since the principal reasonably suspected the evidence of drug use to be schoolwide rather than limited to a certain group of students, the decision to implement a schoolwide search was reasonable.

It should be noted that under federal and New Jersey law, an examination by a scent dog is *not* a "search," see Chapter 4.5B, and thus, school officials in New Jersey would not have to establish "reasonable grounds" to believe that drugs would be detected before they could invite law a enforcement agency to bring drug-detection canines into a school to inspect the exterior surface of lockers. (The Pennsylvania Supreme Court had earlier held that under the Pennsylvania Constitution, a canine sniff is a "search" that must be justified. See, Commonwealth v. Johnson, 515 Pa. 454, 465, 530 A.2d 74, 79 (1987).) Even so, school officials in New Jersey would be well-advised to document the reasons that lead them to invite police to bring drug-detection dogs on school grounds, even if it should turn out that they are not required by the federal or New Jersey Constitutions to establish reasonable grounds to believe that drugs would be detected and seized as a result of the canine sweep inspection.

In any event, the key is that these programs are conducted in good faith, pursuant to a neutral plan and in accordance with the rules discussed in the following section. In Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 674-675, 109 S.Ct. 1384, 1395, 103 L.Ed.2d 685 (1989), a case involving the drug testing of United States Custom Service employees, the United States Supreme Court aptly noted that, "when the Government's interest lies in deterring highly hazardous conduct, a low incidence of such conduct, far from impugning the validity of the scheme for implementing this interest, is more logically viewed as a hallmark of success." 489 U.S. at 676 n.3. Similarly, in Desilets v. Clearview Reg'l Bd. of Educ. 265 N.J. Super. 370, 379 (App. Div. 1993), a New Jersey appellate court recently rejected the argument that a school's policy of searching students' hand luggage brought on class trips was unreasonable merely because these searches had turned up contraband in only six instances over the course of thirteen years of routine inspections. The court concluded that the low incidence of detection could mean that the school's well-publicized school trip search policy had been an effective deterrent. 265 N.J. Super. at 379.

The second factor identified in recent court decisions, a showing of the prior demonstrated need for the search, strongly suggests that school administrators should make specific findings to explain why it is necessary and appropriate to implement a locker inspection program. (See discussion in Chapter 2.9.) School officials, for example, should be prepared to point to particular incidents or to a developing pattern involving drugs or weapons possession by students on school grounds. The statistics cited in the opening chapter of this Manual, detailing the scope and magnitude of the

problem throughout New Jersey's middle and high schools, are the kind of facts that would seem to justify strong action by school officials to discourage students from bringing drugs or weapons on to school property. It is incumbent upon local school authorities to show that a problem warranting a response exists in their particular district or school building.

This burden should not be difficult to meet because, while the nature and magnitude of the problem varies from jurisdiction-to-jurisdiction, no community in New Jersey is immune from the proliferation of drugs and violence. The recent Desilets case is again useful in pointing out that there is no minimum number of acts of violence, vandalism, or substance abuse that must occur before a school can lawfully adopt a particular search policy. In that case, the Appellate Division rejected the argument that the rare incidence of detection (recall that the school's policy of searching all hand luggage brought on a class trips had revealed contraband on only six occasions over the course of thirteen years) was evidence that there was no problem at that particular middle school serious enough to justify these suspicionless searches. 265 N.J. Super. at 379.

As the Pennsylvania Supreme Court recently observed, the goal of providing safe, drug-free schools "is often impeded by the actions of a few students which interfere with the ability of the [state] to achieve this goal." Commonwealth v. Cass, 709 A.2d 350, 364 (Pa. 1998). The United States Supreme Court in Vernonia also emphasized that:

> It is a mistake ... to think the phrase "compelling state interest," in the Fourth Amendment context, describes a fixed, minimum quantum of governmental concerns ... . Rather, the phrase describes an interest which appears *important enough* to justify that particular search at hand, in light of other factors which show the search to be relatively intrusive upon a genuine expectation of privacy. Whether that relatively high degree of government concern is necessary in this case or not, we think it is met. [515 U.S. at ___, 115 S.Ct. at 2394-2395 (italics in original).]

In Commonwealth v. Cass, supra, the Supreme Court of Pennsylvania recently listed several reasons that justified the school official's "heightened concern" as to drug activity in the school. These factors include:

- information received from unnamed students;
- observations from teachers of suspicious activity by the students, such as passing small packages amongst themselves in the hallways;

- increased use of the student assistance program for counselling students with drug problems (See Chapter 14.2 concerning the confidentiality of information that could reveal the identity of specific students participating in drug or alcohol counselling programs);
- calls from concerned parents;
- observation of a growing number of students carrying pagers;
- students in possession of large amounts of money; and,
- increased use of pay phones by students.

The principal in the Pennsylvania case also testified that he had personally observed students exhibiting physical signs of drug use, such as dilated pupils, while in the nurse's office. In Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 115, S.Ct. 2386, 132 L.Ed.2d 576 (1995), the United States Supreme Court referred to several additional factors or circumstances that supported the school district's decision to require student athletes to submit to random urinalysis. These include a marked increase in disciplinary problems and classroom disturbances, more common outbursts of profane language and rude behavior in classes, and direct school staff observations of students using and glamorizing drug and alcohol use. 515 U.S. at ___, 115 S.Ct. at 2388-2389.

Finally, the third factor announced in Vernonia Sch. Dist. 47J v. Acton requires that school officials carefully consider whether there are less restrictive or intrusive alternatives to accomplish their legitimate objective, which is to discourage students from bringing drugs or weapons on to school grounds. Although it would seem to be a well-settled principal of law that the failure to employ a less restrictive alternative will not alone violate the Fourth Amendment requirement of reasonableness, see Vernonia Sch. Dist. 47J v. Acton, supra, 115 S.Ct. at 2396, school officials should be prepared to explain why they thought it necessary to adopt a particular inspection program, and why that program was designed to achieve its objectives while minimizing invasions of privacy, disruption of the school environment, and other negative consequences to the greatest extent possible. (See also discussion in Chapter 2.8.)

4.3. Announced Versus Unannounced Inspections.

In some instances, it might be appropriate to provide members of the school community with advance notice as to the *specific date and time* when lockers will be inspected. (This is commonly done when the purpose of the inspection is to encourage students to "clean out" their lockers, to take home soiled athletic clothing, or to remove and discard food products that might spoil or attract vermin.) The practice of providing advance specific notice would afford students both the opportunity and practical incentive to remove prohibited (and highly personal) items.

Given such specific notice, it seems unlikely that students would be able to claim that they retain a reasonable expectation of privacy in their lockers, and students in these circumstances would certainly not be able to claim that they reasonably believed that the contents of their lockers would remain private on the day of the planned inspection. However, providing specific advance notice of a search could actually backfire were students to come to believe that they are always entitled, by custom and practice, to such prior, specific notification. In other words, receiving advance specific notice could conceivably become part of their "reasonable expectations." That is why it would be important to make clear at the outset of any such program that the school also reserves the right to conduct *un*announced inspections.

In any event, many school officials strongly believe that as a practical matter, such announced inspections, even if conducted frequently, could not realistically achieve one of the critical objectives of an inspection program that is geared to address more serious misconduct involving drugs, alcohol, and weapons, namely, to discourage children from bringing these prohibited items back on to school property. Those students who carry weapons or drugs could all too easily modify their behavior by temporarily removing weapons or guns in advance of the announced inspection, and then bring the prohibited items back to school once the announced inspection episode is completed.

For all of these reasons, school officials may want to develop a program involving "unannounced" locker inspections. By "unannounced," we mean only that a student would not be advised in advance of the specific date and time when his or her locker would be opened and subject to inspection by school authorities. Clearly, pursuant to the express requirements of N.J.S.A. 18A:36-19.2, students and their parents must be given some notice — at least in general terms — that the school intends to inspect lockers on a periodic basis. As used in this Manual, the terms "notice" or "advance notice" mean simply that students and their parents would be alerted to the possibility that lockers or other places will be inspected in accordance with law.

4.4. Model Locker Inspection Program.

Because there is little caselaw on point, school officials should make every reasonable effort to dot all of the *i's* and cross all of the *t's* in designing and implementing any locker inspection program. (Note that for the purpose of this Manual, no distinction is drawn between regular lockers and gym lockers.) Such care in designing the program will demonstrate the school district's regard for the privacy rights embodied in the Fourth Amendment and in Article I, Paragraph 7 of the New Jersey Constitution. Any locker inspection program conducted pursuant to the authority of N.J.S.A. 18A:36-19.2 should at a minimum include the following components and features:

A. Findings. The local board of education, school district superintendent, and/or school principal should adopt and memorialize specific findings that detail the nature, scope, and magnitude of the problem sought to be addressed by the locker inspection program. The T.L.O. decision contemplates a balancing act, weighing the need to preserve order, discipline, and safety on the one hand against the need to respect students' privacy interests on the other hand. The findings should therefore explain why it is necessary and appropriate to adopt an inspection program, and why the program chosen constitutes a reasonable if not least intrusive means available to ensure the health, safety, and security of students and other members of the school community. (For example, the findings could establish that the contemplated locker inspection program is less intrusive, disruptive, and burdensome than other techniques that are now used in several school districts, including point-of-entry inspections and metal detectors.)

In Commonwealth v. Cass, 709 A.2d 350, 357 (Pa. 1998), the Supreme Court of Pennsylvania recently listed several reasons that justified the school official's "heightened concern" as to drug activity in the school. These factors include:

- information received from unnamed students;
- observations from teachers of suspicious activity by the students, such as passing small packages amongst themselves in the hallways;
- increased use of the student assistance program for counselling students with drug problems (See Chapter 14.2 concerning the confidentiality of information that could reveal the identity of specific students participating in drug or alcohol counselling programs);
- calls from concerned parents;
- observation of a growing number of students carrying pagers;
- students in possession of large amounts of money; and,
- increased use of pay phones by students.

The principal in the Pennsylvania case also testified that he had personally observed students exhibiting physical signs of drug use, such as dilated pupils, while in the nurse's office. In Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 115, S.Ct. 2386, 132 L.Ed.2d 576 (1995), the United States Supreme Court referred to several additional factors or circumstances that supported the school district's decision to require student athletes to submit to random urinalysis. These include a marked increase in disciplinary problems and classroom disturbances, more common outbursts of profane language and rude behavior in classes, and direct school staff observations of students using and glamorizing drug and alcohol use. 515 U.S. at ___, 115 S.Ct. at 2388-2389.

The findings should emphasize that the goal of the program is to prevent and discourage students from bringing or keeping dangerous weapons, drugs, alcohol, tobacco, or other prohibited or unsafe and unsanitary objects on school property, and that the program is *not* principally designed to result in the apprehension or prosecution of students who violate the law or school rules. (Clearly, the inspection program need not be limited to drugs, alcohol, firearms, and other weapons, but could also serve to discourage all forms of conduct that are detrimental to students' health, safety, and welfare.)

However, it should be made clear that any firearms or other dangerous weapons, illicit drugs, or other forms of contraband discovered during the course of a locker inspection will be turned over to law enforcement authorities, pursuant to rules and regulations promulgated by the State Board of Education, for appropriate handling by prosecutors and police. (See Chapter 14.1 for a more detailed discussion of the responsibility of school officials to refer matters and to turn over evidence to police.)

B. Advance Notice of Program. All students and members of the school community, including parents and legal guardians, should be afforded notice in writing of the nature and purpose of the locker inspection program. In addition to providing parents with written notification, students should be alerted to the program in their homeroom classes and/or in a school assembly.

At the beginning of the next school year, notice should also be provided in the student handbook and at the time that lockers are assigned for student use. In addition, an article or announcement could be placed in the school newspaper. In sum, school officials should use all available means to make certain that all students understand that the school retains a master key, and that lockers assigned to students will be subject to opening and inspection on a regular, periodic basis. Providing such warning is consistent with the true goal of the program, which is to deter students from bringing or keeping prohibited items on school grounds. The whole point of the exercise, after all, would be lost if the program were kept a secret.

Students and parents should be advised that any closed containers kept in lockers that are selected for inspection may be opened and their contents examined. Students should thus be warned that if they desire that the contents of closed containers (such as bookbags, purses, or knapsacks) be kept private, such containers should not be placed in lockers.

In addition, students and parents should be advised that drugs or weapons will be turned over to police in accordance with the requirements of state law and rules and regulations promulgated by the State Board of Education. (See Chapter 14.1.)

The notice provided to students and parents need not announce the specific details of the neutral inspection plan described below. Rather, it would be sufficient for purposes of the notification requirement to point out that all lockers and containers or objects kept in lockers are subject to inspection, and that the decision on a given occasion to search specific lockers will be determined in a random fashion pursuant to a neutral plan.

Finally, with respect to notice, all students should be alerted to the "amnesty" feature in the Memorandum of Agreement Between Education and Law Enforcement Officials (1992), which is designed to encourage students with a substance abuse problem to turn over drugs to school officials and to accept help. (See Chapter 14.1C for a more detailed discussion of this policy, which is codified in regulations promulgated by the State Board of Education and an Attorney General Executive Directive.) Students should be clearly advised that this provision applies only where a student voluntarily and on his or her own initiative turns over illicit drugs to a teacher or other school staff member. It does *not* apply where the drugs are discovered in a search, or where the drugs are turned over in anticipation of their imminent discovery in a search to be conducted by school officials. Nor does the amnesty feature apply to firearms or other dangerous weapons.

C. Neutral Plan. Each local board of education, school district superintendent, or building principal should develop a neutral inspection plan that is designed "to assure that the individual's reasonable expectation of privacy is not subject to the discretion of the official in the field." New Jersey v. T.L.O., supra, 105 S.Ct. at 743. n.8. This planning approach is similar to the one that police must follow to justify so-called "field sobriety checkpoints." See State v. Kirk, 202 N.J. 28, 57-58 (App. Div. 1985). See also Michigan Dep't. of State Police v. Sitz, 496 U.S. 444 (1990), 110 S.Ct. 2481, 110 L.Ed.2d 412.

A "neutral plan" is one that is based on objective criteria established in advance by appropriate school authorities. These neutral or objective selection criteria are essential to provide the "other safeguards," to use the T.L.O. Court's phraseology, that will serve as a substitute for the individualized suspicion that is generally required before school officials may conduct a search. Establishing a neutral plan that reduces the discretion of school officials in selecting students who will be subject to a search also means that there will be less stigma attached to the search, since individuals are not

being singled-out based on a particularized suspicion. See Desilets v. Clearview Reg'l Bd. of Educ., 265 N.J. Super. 370, 379 (App. Div. 1993).

Specifically, the plan should be developed by a high-ranking school official, such as a superintendent or building principal. The plan should be reviewed and approved by the board of education. The decision regarding what lockers to open on a given date should not be made on an ad hoc basis by subordinate school officials.

The plan should explain in precise detail how individual lockers or groups of lockers will be selected for inspection, taking into account that it is probably not feasible to open and inspect every locker in the school building every time that an inspection is undertaken. In other words, the plan should balance the need for pervasive inspection against the limitations on available personnel resources and the limited time available to undertake this activity.

It would be preferable, from both a policy and legal perspective, for school officials to use some *random* drawing method to select lockers or corridors for inspection, or else, where feasible, to inspect *all* lockers. In fact, courts have noted in the context of police road blocks that the use of fixed checkpoints at which all persons are stopped and questioned creates less concern and anxiety than selective random stops, and also eliminates the potential abusive exercise of discretion. See Desilets v. Clearview Reg'l Bd. of Educ., 265 N.J. Super. 370, 379 (App. Div. 1993).

In any event, a "lottery" system would satisfactorily circumscribe discretion and thus provide adequate assurances that certain lockers have not been selectively and capriciously targeted for inspection. Random sampling is a statistical technique that ensures that any member of a population has an equal chance of inclusion in a sample for study. A random drawing scheme would ensure that inspections are not used to harass or punish individual students, and that specific lockers have not been targeted or selected on the basis of clearly impermissible criteria, such as race or ethnicity.

In addition, as noted above, by using a random selection technique to identify those lockers to be opened, there will be little if any stigma attached to the search, since individuals are not being singled out based upon a particularized suspicion. See Desilets v. Clearview Reg'l Bd. of Educ., 265 N.J. Super. 370, 379 (App. Div. 1993). This type of program and neutral plan, in other words, dilutes the accusatory nature of the search, and because a random search is non-accusatory in nature, "the degree of insult to an individual's dignity and thus the extent of the invasion are reduced." In the Interest of Isiah B., 500 N.W.2d 637, 644 (Wis. 1993) (Abrahamson, J., concurring and dissenting).

Lockers should not be selected for inspection, or be subject to a greater probability of being selected, on the basis of associations (i.e., membership in "gangs" or troublesome groups or cliques). Note in this regard that inspections conducted pursuant to a suspicionless locker inspection program should *not* be based on individualized suspicion, that is, an articulable suspicion that weapons, drugs, or other prohibited items would be found in a particular locker. Rather, this random inspection program must be kept analytically distinct from the authority of school officials to search specific lockers based upon individualized suspicion of wrongdoing. (See Chapter 3.)

Accordingly, in any case where a particularized suspicion exists, the locker believed to contain drugs, weapons, or other contraband or evidence should only be searched in accordance with the legal standards spelled out in T.L.O. and described in Chapter 3. The random locker inspection program must *never* be used as a ruse or subterfuge to open a locker where reasonable grounds to search that locker exist or, worse still, where a school official suspects the presence of drugs or weapons in a particular locker, but believes that there are insufficient grounds to conduct a lawful search in accordance with the rule established in T.L.O.. Needless to say, school officials must never tamper with the random selection process or criteria established in the plan.

As a general proposition, the neutral plan should be designed so that all lockers in the school building are subject to inspection . Obviously, however, school authorities may exempt lockers assigned to very young students if the program is designed to address the problem of drugs and weapons and if there is no reason to believe that students in lower grades are involved in these violations. (School officials should note that according to recent surveys of New Jersey middle school students, the problem of the use and possession of drugs, alcohol, and weapons starts at a distressingly young age.) Furthermore, the plan may provide for a greater probability of selection based upon neutral criteria, such as grade level. Thus, for example, the inspection plan could provide that lockers assigned to seniors will be subject to a greater probability of being selected for inspection than those lockers that are assigned to freshman, at least if there is reason to believe that seniors are more likely to bring dangerous or prohibited items on to school property.

The plan certainly need not require that an equal number of lockers be opened during each inspection episode. The plan could provide, for example, that ten randomly-selected lockers will be opened on Mondays, whereas fifty lockers will be opened on Wednesdays. In fact, the plan need not specify the days or times when inspection episodes will occur, and could simply provide that inspections will occur on a periodic basis (i.e., weekly). Note also that school officials would retain the option at any time — and without the need to provide further notice — to increase (or decrease) the

number or percentage of lockers to be opened in any given inspection. School officials could, for example, decide at any time to open all of the lockers in the school, assuming that is logistically possible given the size of the school and personnel resources available to conduct the inspection. Obviously, the smaller the number or percentage of lockers to be inspected, the smaller the perceived risk of being "caught," thus reducing the deterrent effect. (However, school officials need not announce the exact number of lockers to be opened in any inspection episode.)

As noted above, the plan need not require that an inspection be conducted every day or every week. The plan need only provide that the inspections occur on a consistent and persistent basis. To use the New Jersey Supreme Court's characterization in Engerud, the inspections should be conducted on a sufficiently "regular" basis so that no student could claim an expectation of privacy in the contents of the lockers. Because each inspection episode could involve opening only a comparatively small number of randomly-selected lockers, the better practice would be to conduct inspections on a frequent basis. This would serve not only to satisfy the "regular basis" criterion mentioned in the Engerud case, but would also maximize the deterrent effect, since drug or weapons carrying students might be emboldened immediately following an inspection episode if they thought that it was unlikely that another inspection would be conducted any time soon.

Finally, and importantly, the plan should be reducing to writing. It is important for school authorities to be able to document all of the procedural safeguards that were used to prevent capricious or harassing inspections. School officials must expect that the plan will be challenged in court in a motion to suppress physical evidence in the event that an inspection were to reveal a weapon or drugs.

This does not mean that all of the details of the plan must be made public. In fact, the better practice would be to keep confidential those details (such as timing) that, if revealed, might make it possible for students bent on keeping drugs or weapons in their lockers to anticipate specific inspection episodes and thereby evade detection. However, in providing the student body and parents with general notice of the intention to use periodic random locker inspections, school authorities should describe the neutral plan in sufficient detail that students and parents can be confident that the program is based on a legitimate need to respond to a problem that exists in the school, and that the plan includes safeguards to make certain that inspections will not be used to harass or discriminate against any particular student or group of students.

D. Execution. All inspections should be conducted by those persons who are specifically "designated by the local board of education." See N.J.S.A. 18A:36-19.2. All

persons conducting the inspections should be thoroughly familiar with the neutral plan and must stick to it. Thus, for example, inspections should only be conducted with respect to those lockers that have been selected for opening in accordance with the selection criteria and method established in the plan.

The inspections should be conducted in a manner that minimizes the degree of intrusiveness. Inspections should be limited to looking for items that do not belong on school property or in a locker. Personal possessions should not be damaged, and school officials conducing the inspections should not read personal notes or entries in diaries or journals.

All persons conducting inspections should be thoroughly familiar with the procedures for handling (actually, for refraining from handling) suspected firearms. In addition, all school staff members involved in conducting these inspections must be familiar with the referral procedures set forth in N.J.A.C. 6:29-10, et seq. and the Memorandum of Agreement Between Education and Law Enforcement Officials (1992), which specifies when and under what circumstances school officials must turn over illicit drugs, firearms, or other items to law enforcement authorities. (These referral policies are described in more detail in Chapter 14.1.)

It is essential to remember, however, that law enforcement officers must not participate in the conduct of these inspections and should not even be present or "standing by" in the corridor in anticipation of such referrals. Under no circumstances should a law enforcement officer direct a school to undertake a locker inspection program or a specific inspection episode. Rather, it is critically important that any and all such inspections be conducted independently from law enforcement authorities, based solely upon the authority of school officials to take steps to preserve discipline, order, and security in the school.

E. Training. The county prosecutor's office and the local police department should be available to provide training to designated school personnel so that they will be able to recognize firearms, other dangerous weapons, illicit drugs, evidence of hate crimes, or other contraband or prohibited items. This training, which should be provided in advance of the inspection, will help to make certain that the program is conducted in a safe and efficient manner. Local law enforcement authorities can explain, for example, what drugs are thought to be most commonly used by adolescents in the jurisdiction, and police can show school officials how these substances are typically packaged and concealed. This minimal police involvement would not transform the subsequently executed inspection into a law enforcement activity subject to the far stricter rules governing police searches.

F. Referrals to Law Enforcement. The plan should expressly provide that all persons conducting an inspection pursuant to the program will comply with the referral procedures spelled out in the rules and regulations promulgated by the State Board of Education. (See Chapter 14.1 for a more detailed discussion of these regulatory obligations.) It is critical to note that it is an offense to dispose of any suspected controlled dangerous substance by any means other than by turning over the substance to a law enforcement officer. N.J.S.A. 2C:35-10c. In addition, it is an indictable crime in New Jersey to conceal or destroy *any* evidence of a crime, including, but not limited to, drugs or any other type of contraband. See N.J.S.A. 2C:28-6 and 2C:29-3a(3).

G. No Pre-emption of Individualized Searches. The plan should make clear that nothing in this program should be construed in any way to prohibit or limit the authority of school officials to conduct a search of a specific locker or other property where there are individualized, reasonable grounds to believe that evidence of a crime or school rule infraction will be found therein. As noted above, random locker inspection programs are only one of the several options or tools available to school officials to maintain order and to keep weapons and drugs off school property.

H. Limitations. The plan ordinarily should provide that the inspection program be limited to lockers, desks, or similar storage facilities provided by the school for use by students. Note in this regard that N.J.S.A. 18A:36-19.2 specifically refers only to "lockers or other storage facilities provided for use by students." The inspection plan, therefore, should not extend to knapsacks, briefcases, handbags, or other personal possessions that are being carried by students. The authority of school officials to conduct searches and inspection of such containers is discussed in Chapter 4.5E.

Note, however, that school officials are authorized and permitted to open and inspect any closed containers or objects that are stored in a locker that has been selected and opened pursuant to the neutral plan, provided that the object or container can be opened without causing permanent damage to the object or container. (The inspection itself must be conducted in a reasonable manner. School officials should not damage objects or containers found in lockers that are subject to lawful inspection.)

It would make no sense, after all, to permit school authorities to inspect the contents of a locker, but prohibit them from inspecting the contents of a bookbag stored in the locker and in which drugs or weapons could easily be concealed. (Indeed, it is unlikely that drugs would be strewn loosely or haphazardly in a locker; rather, it is far more likely that a drug selling or using student would further conceal and store the drugs in some form of portable container.) In providing students and parents with advance

notice of the intention to implement a locker inspection program, school authorities should clearly announce that closed containers that are kept in lockers will be subject to inspection.

4.5. Drug-Detection Canines.

A. Overview. In many school districts throughout New Jersey and the rest of the nation, school administrators have invited law enforcement agencies to bring drug-detection canines into schools to ferret out controlled substances that may be stored in lockers.

Because drug-detection canines are usually used to conduct a schoolwide inspection or "sweep," such programs are often thought of as a form of "general" or "suspicionless" search, distinct from the kind of searches governed by New Jersey v. T.L.O., which dealt with searches conducted by school officials that focus on a particular location based upon a pre-existing suspicion that evidence of a violation of law or school rules would be found at that particular location. It is more precise, however, to say that the use of a drug-detection dog represents a hybrid form of search; the legal nature of this governmental conduct (and hence the applicable legal standard) will usually change during the course of the inspection episode. At the outset, the schoolwide canine inspection falls neatly within the definition of a general or suspicionless search, and this conduct need not be justified under the T.L.O. reasonable grounds test, much less the stricter probable cause standard. See Chapter 4.5B (noting that most courts have concluded that the canine sniff of the exterior surface of a locker is not a "search" for Fourth Amendment purposes). Once a drug-detection dog alerts to the presence of controlled dangerous substances, however, the ensuing act of opening the locker in response to the dog's alert clearly constitutes a particularized, suspicion-based "search" for purposes of Fourth Amendment analysis.

As is true with respect to the resolution of all search and seizure issues, when considering the lawfulness of the deployment of drug-detection canines, the timing and sequence of events becomes critical. Police and school officials must be prepared to document the precise moment within an unfolding chain of events when the Fourth Amendment requirement of probable cause (or reasonable grounds in the case of a search conducted independently by school officials) is triggered. Because the overwhelming majority of lockers that will be examined or "sniffed" by a drug-detection canine will not produce an alert, and thus will not be opened, we have chosen to include our discussion of drug-detection canines in that portion of the Manual that relates to general or suspicionless searches. This allocation is also appropriate given the overriding goal sought to be accomplished by using drug-detection canines, which is to discourage

students from bringing drugs on to school grounds, and not to actually find and seize drugs or other contraband.

Although the legal issues concerning the appropriate use of drug-detection canines are complicated and not fully settled, one thing at least is certain. The use of scent dogs is a dramatic tactic designed to convey to students in the strongest possible terms that neither school authorities nor law enforcement agencies will tolerate illicit drugs or other dangerous substances or devices on school property. The goal is not to find drugs or to catch drug abusing or dealing students, but rather to get the attention of the entire student body through the use of this highly visible and aggressive tactic. In addition, the planning for the use of this technique affords law enforcement and education officials with an excellent opportunity to engage parents and members of the school community in a frank discussion of the nature of the drug and alcohol problem in the school. See Chapter 4.5F(2) for a discussion of the need to solicit parental input.

Scent dogs are an extremely valuable and versatile law enforcement asset. Training requirements for drug-detection dogs are strict, and the animals are carefully screened throughout their training regimen. Usually, the dog will work with the same handler, so that the handler can learn which movement or reaction by the dog — the "alert" or "key" — indicates the presence of illicit substances or explosives. A number of different alert cues are used, including snarling, barking, circling, sitting, scratching or pawing at the object suspected to contain illicit substances or explosives.

The effectiveness of the use of drug-detection canines in schools will depend upon a number of factors, including, notably, how often school lockers are subjected to this type of inspection. The use of scent dogs on infrequent, isolated occasions may not be enough to convince students that school authorities are willing to undertake routine and persistent efforts to find concealed substances that pose a danger to the school community. School authorities should also carefully consider the possibility that a well-publicized inspection by a scent dog may fail to undercover drugs that are, in fact, secreted in lockers. (This is sometimes referred to as a "false negative" result.) The unintended effect can be to embolden student drug users and dealers by leading them to believe that they can "beat the system," and that they face only a comparatively small risk of being caught. The whole point of an inspection program would be lost if students come to believe they can use and sell drugs with impunity.

School authorities should also consider that the "zero tolerance" message that they may hope to convey by inviting scent dogs into schools could unwittingly be undermined if the particular method used to conduct the inspection requires that those students who are found to be in constructive possession of a large quantity of drugs —

an amount consistent with drug *distribution* activities — are immune from criminal prosecution. (See Chapter 4.5D(4) concerning limitations on the ability to initiate a criminal prosecution when a scent dog's positive alert is used as the factual basis to authorize a school official to open the locker to inspect its contents.)

For all of these reasons, school officials should not view drug-detection canines as a panacea or a "quick fix." Indeed, in Vernonia Sch. Dist. 47J v. Acton, the United States Supreme Court noted that school officials in that troubled district had "even brought in a specially trained dog to detect drugs, but the drug problem persisted." 515 U.S. 646, ___, 115 S.Ct. 2386, 2389, 132 L.Ed.2d 564, ___ (1995). The inability of the use of drug-detection canines to stem the tide of drug abuse prompted school officials in that district to resort to random drug testing. Given the inherent limits on the effectiveness of a scent dog program, the better policy and practice is to use periodic canine searches to supplement, not to supplant, other methods and procedures available to school officials to discourage students from bringing and keeping drugs and prohibited weapons on school grounds.

Occasionally, a drug-detection dog will be used to examine a specific locker assigned to a student who is already suspected of possessing or distributing controlled dangerous substances. The scent dog in those circumstances would be used as a criminal investigation technique to corroborate information already known to school officials and/or law enforcement officers. This is typically done to establish sufficient probable cause so that a law enforcement agency can apply for a warrant to search the contents of the locker suspected of containing illicit drugs.

In fact, most of the reported court decisions dealing with the use of drug-detection canines involve cases where a dog was brought to the scene of a lawfully-stopped motor vehicle to corroborate a detaining officer's suspicion that the vehicle was being used to transport illicit drugs. Less frequently, law enforcement canines are used to conduct "sweep" or "dragnet" searches involving large areas. Sometimes, the dogs sniff for nitrates and explosives as part of a security detail or in response to a bomb scare. In the context of lockers and school searches, however, it is far more common for scent dogs to be used to sweep for concealed drugs. These inspections do not focus on and are not limited to any particular locker. Accordingly, the use of scent dogs for this purpose would constitute a "suspicionless" or "generalized" search as that term is used in this Manual, although, for the reasons discussed below in subsection B, the better reasoned view is that the use of a dog to examine the exterior surface of a locker is technically not a "search" at all under the Fourth Amendment.

This Chapter generally assumes that the drug-detection canines that will be used in schools are trained, owned, and operated or "handled" by a law enforcement officer or agency. Note that for legal purposes, it makes no difference whether the law enforcement dog handler is on or off-duty at the time of the inspection. Whenever a drug-detection canine that is owned by a police department and that is handled by a law enforcement officer is brought into a school to examine lockers or student property, that operation will be subject to the rules governing law enforcement searches and seizures, and not the more flexible rules governing searches undertaken by school officials.

As noted in Chapter 2.6, some private companies make scent dogs available to schools, and because these animals and handlers are in no way connected to a law enforcement or prosecuting agency, their use would not appear to implicate the stricter rules governing searches conducted by or under the direction or auspices of a law enforcement officer, although several courts have ruled that searches of students were unconstitutional, notwithstanding that the scent dogs were owed and operated by private security companies. See e.g., Jones v. Latexo Indep. Sch. Dist., 499 F.Supp. 223 (E.D. Tex. 1980; Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470 (5th Cir. 1982) cert. denied, 463 U.S. 1207, 103 S.Ct. 3536, 77 L.Ed.2d 1387 (1982).

In any event, the use of privately-owned drug-detection canines is neither endorsed nor encouraged, and no claim is made as to the effectiveness or accuracy of these privately-owned animals. Furthermore, should privately-owned dogs be used, school officials should clearly understand that any suspected drugs discovered as a result of the inspection must be turned over to the police, and that the "amnesty" provision, codified at N.J.A.C. 6:29-10.5(a)(1) and discussed in Chapter 14.1C, would *not* apply in these circumstances. The failure by school officials, or by an employee of the private company that owns the scent dogs, to turn over suspected drugs to the police would not only constitute a violation of New Jersey's drug laws, see N.J.S.A. 2C:35-10c, but would also constitute a violation of the state's evidence tampering statute. See N.J.S.A. 2C:28-6 and 2C:29-3a(3). (For a more detailed discussion of the legal and practical problems in using privately-owned drug-detection dogs, see Chapter 2.6.)

Finally, it should be noted that sophisticated new technologies, such as ion mobility spectrometry, are now available to the law enforcement community to perform some of the drug-and-explosives detection functions that heretofore could only have been performed by specially trained canines or other domesticated animals with an acute olfactory sense. These electronic devices produce semi-quantitative results and, in some applications, appear to be more accurate and objective than scent dogs. (Unlike canines, these devices do not tire, and their attention cannot be distracted by extraneous

influences, such as food or the scent of other dogs in heat.) It is expected that these instruments will become more available and accessible over time.

For purposes of this Manual, the use of such electronic devices implicates essentially the same legal issues that arise when scent dogs are deployed. This is true despite the United States Supreme Court's characterization, discussed in the next section, that a scent dog's sniff is "sui generis." When the Court in 1983 decided United States v. Place, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983), it may not have been aware of and could not have envisioned any other investigative procedure that results in as limited a privacy intrusion as a dog sniff. The fact remains, however, that emerging technologies may well in the not-too-distant future provide a suitable substitute for drug-detection dogs in a number of applications, including sweeps conducted in schools.

At present, some of these electronic devices make use of a portable, hand-held vacuum cleaner to "sniff" the subject or object being inspected. (Molecules lifted by the vacuum from the exterior surface of the object being examined are trapped in a specially designed nylon filter, which is then inserted into the electronic device for molecular analysis.) The act of subjecting a person or object to this form of inspection, for purposes of this Manual, is tantamount to subjecting the object (or person) to examination by a scent dog. The use of these hand-held vacuum collectors is decidedly different from the use of a scent dog in one important legal and policy respect: A detection canine has the potential to become excited, overreact, and attack or at least frighten a person who comes in direct contact with the animal. The hand-held vacuum collectors, in contrast, are no more intimidating and threatening than the hand-held metal detectors or "wands" that are now commonly in use in a number of settings, including airports and courthouses. Accordingly, the rule announced in this Manual generally prohibiting scent dogs from being used to sniff students or clothing while being worn by students (see Chapter 4.5F(9)) does not apply to these electronic devices or their collection apparatus.

B. An Examination by a Scent Dog is Not a "Search." In United States v. Place, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983), the United States Supreme Court held that the use of a law enforcement drug-detector dog to sniff the exterior surface of a container is, at most, a "minimally intrusive" act — one that does not constitute a "search" for purposes of the Fourth Amendment. The Court concluded that the act of subjecting property to inspection by a law enforcement-handled canine simply cannot reveal anything private about the contents of the object being sniffed. The dogs, in other words, are trained only to alert to selected controlled dangerous substances (or

explosives residue) and, therefore, will not react to non-contraband items that might be of a highly private or personal nature.

Specifically, the United States Supreme Court in Place stated:

> We have affirmed that a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment. A canine sniff by a well-trained "narcotics" detection dog, however, does not require opening the luggage. It does not expose non-contraband items that otherwise would remain hidden from public view... . Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited... . In these respects, the canine's sniff is sui generis. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure.
> [462 U.S. at 706-707.]

Although the Court in Place held that a canine sniff reveals something about the contents of the closed container being examined, it is important to recognize that, from a scientific perspective, a drug-detection animal does not and cannot react to molecules that are still located within the closed container that is the subject of the inspection (unless the dog's sniffing by a vent or small opening happens to draw out airborne particles from inside). Rather, the animal usually can respond only to molecules on the exterior surface or in the air surrounding the closed container. (Arguably, these molecules are in "plain view.")

When a dog "hits" on a particular place or container, the conclusion that drugs or explosives are concealed therein must therefore be premised on an inference. Specifically, the dog's handler must deduce from the nature of the dog's alert that the molecules the dog is reacting to had at some point in time escaped from inside the locker or other closed and opaque receptacle. (Alternatively, the molecules the dog has alerted to may have been placed on the exterior surface by someone who had recently handled narcotics or explosives. This occurs most often with respect to the inspection of door knobs and car door handles. In that event, the inference that drugs are concealed inside the container or vehicle is based on the assumption that a person who had been in direct

contact with illicit substances or explosives had recently opened or exercised control over the object or container being examined.)

The United States Supreme Court's decision in Place does not mean that the use of drug-detection dogs is permissible in all circumstances. The Court held only that, "the particular course of investigation that the agents intended to pursue here — exposure of respondent's luggage, which was located in a public place, to a trained canine — did not constitute an internal search within the meaning of the Fourth Amendment." If the encounter between the dog and the object subject to inspection could only be achieved by bringing the dog into an area entitled to Fourth Amendment protection, such as by opening a car door or trunk or a locker, that entry is itself a full-blown "search" that is subject to significant limitations imposed by the Fourth Amendment. In other words, the canine must be lawfully in place at the time the inspection is made. (See Chapter 11 for a more detailed explanation of the "plain view" doctrine.)

In State v. Cancel, 256 N.J. Super. 430 (App. Div. 1992), a New Jersey court quoted extensively and approvingly to the United States Supreme Court's decision in Place. The Appellate Division explained why the warrantless use of a narcotics-sniffing dog is permitted not only under the Fourth Amendment, but also under Article I, Paragraph 7 of the New Jersey Constitution. In light of Cancel, it would seem that narcotics-detection dogs can be used in New Jersey to sniff the air surrounding or the exterior surface of a student's locker, vehicle, or other container without running afoul of the Fourth Amendment or its state constitutional counterpart, even though that inspection is not based upon full probable cause or even a mere reasonable suspicion to believe that drugs are concealed in the locker or object subject to inspection.

It must be noted, however, that the New Jersey Supreme Court has not had occasion to issue a definitive ruling on this question. Furthermore, not all courts agree that the use of a scent dog falls short of conduct constituting a search. In neighboring Pennsylvania, for example, the state's highest court held that under the Pennsylvania Constitution, a canine sniff of a place is a "search," but that because it involves a minimal intrusion and is directed to a compelling state interest in eradicating illegal drug trafficking, the sniff of a place may be carried out on the basis of an articulated "reasonable suspicion," not probable cause. See Commonwealth v. Johnson, 515 Pa. 454, 465, 530 A.2d 74, 79 (1987). The Pennsylvania Supreme Court viewed this as a constitutional "middle ground" between requiring full probable cause to believe that evidence of a crime would be discovered, and the federal law approach of requiring nothing at all before police would be permitted to conduct a canine sniff examination.

The Pennsylvania Supreme Court recently embraced the Johnson "middle ground" standard when presented directly with the issue of what standard of judicial review should apply to the use of drug-detection dogs to examine school lockers. In Commonwealth v. Cass, 709 A.2d 350 (Pa. 1998), the court approved the use of drug-detection canines to conduct a schoolwide locker inspection program and ruled that under the Pennsylvania Constitution, school officials need not have full probable cause to believe that the canine sniff would reveal contraband or evidence of a crime. Rather, the court used the more flexible "reasonable grounds" standard announced in T.L.O.

In Commonwealth v. Martin, 626 A.2d 556 (Pa. 1993), the Pennsylvania Court adopted an even stricter rule with respect to a canine examination of a person, as opposed to a place. The Court in Martin ultimately ruled that to examine a person (in that case, a satchel being carried by the suspect), police must have full probable cause to believe that a canine sniff will reveal contraband or evidence of a crime. Id. at 560.

Curiously, the court in Martin apparently drew no distinction between an actual canine examination of the "person" (i.e., articles of clothing being worn by the suspect at the time of the scent dog examination) and hand luggage being carried by the suspect, since the defendant in that case had been directed by police to place the satchel on the ground, at which point it was first examined by the drug-detection canine. 626 A.2d at 558. There is no indication in the reported decision that the animal at any time came into direct contact with any of the suspects. The court, in other words, assumed, without explanation or citation to authority, that an examination of the exterior surface of a portable container constitutes as great an intrusion as an examination of a person's body.

Other courts have held that the use of a narcotics-detection dog amounts to a "search" in the specific context of canines brought in to a schoolhouse. In Jones v. Latexo Indep. Sch. Dist., 499 F.Supp. 223 (E.D. Tex. 1980), for example, the court found that the use of a drug-detection dog was unreasonable and thus unconstitutional, even though the dog in that case was owed by a private security company. The court noted that while the degree of intrusion committed by a dog that sniffed students and their property was somewhat less extensive than that associated with a more traditional physical search, the court nonetheless recognized that "the use of an animal ... to conduct a search may offend the sensibilities of those targeted for inspection more seriously than would an electronic gadget." Jones at 233.

The court further noted that the drug-detection dog that was used in that case, a German Shepard, was a large animal that had first been trained as an attack dog. The court observed:

> Testimony by the school's principal ... indicated that the dog "slobbered" on one child in the course of a search. The dog's trainer acknowledged that [it] might physically touch a child during a search if the dog became overly excited. Such a tool of surveillance would prove intimidating and frightening, particularly to the children, some as young as kindergarten age, enrolled at Latexo. Hence, the degree of intrusion caused by the search was significant... .
> [Jones at 324.]

In Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470 (5th Cir) cert. denied, 463 U.S. 1207, 103 S.Ct. 3536, 77 L.Ed.2d 1387 (1982), the court likewise concluded that the sniff by a drug-detection canine constituted a search, even though the animal in that case, as in the Jones case, was owned by a private security corporation.

It is critical to note that the Jones and Horton opinions were written before Place was decided, and that in both cases, the animals were used to sniff students, not just the exterior surfaces of lockers. The court in Horton aptly noted that, "society recognizes the interests in the integrity of one's person, and the Fourth Amendment applies with its fullest vigor against any indecent or indelicate intrusion on the human body." 677 F.2d at 480. It is likely that this principle remains intact, especially in New Jersey, notwithstanding the subsequent rulings in Place and Cancel.

In light of the Jones and Horton cases and the recent decision of the Pennsylvania Supreme Court in Martin, and in the absence of a definitive ruling to the contrary by the New Jersey Supreme Court, the better practice would be to assume that the use of a canine to examine students and clothing being worn by them would constitute a full-blown "search." Accordingly, and for compelling policy as well as legal reasons, this Manual requires that in conducting an operation involving drug-detection dogs, *the law enforcement agency involved must develop and follow an operational plan that makes certain that the animals do not come into direct contact with students.* (See Chapter 4.5F(9).)

Finally, it must be clearly understood that the act of *opening* the locker or *entering* any part of a vehicle or container, whether in response to a dog's alert or to provide the dog access to a location to facilitate its examination, would clearly constitute a "search" for purposes of the Constitution and this Manual. (An act by the dog of "poking" or "prying" goes beyond mere sniffing, and falls within the definition of the term "search,"

as used in this Manual.) It bears repeating at this point that all searches made by law enforcement officers must be conducted pursuant to a warrant issued by a judge unless the search implicates one of the narrowly-drawn and jealously-guarded exceptions to the warrant requirement, such as "consent," "exigent circumstances," or the so-called "automobile exception."

C. Does a Scent Dog Alert Constitute Probable Cause or Reasonable Grounds to Conduct a Search? It is still not completely clear under the law whether an alert by a drug-detection dog by itself constitutes probable cause to believe that evidence of a crime will be found in a specific location. Most published scent dog cases involve automobile stops where the drug-detector dog's alert was considered by the court in conjunction with additional facts known to the police that indicated that illicit drugs were present. Presumably, an officer during a routine motor vehicle stop would not bother to request assistance from a drug-detection canine unit unless the officer had some factual basis for believing that the animal might alert to the presence of illicit drugs. Because courts use what is known as a "totality of the circumstance" test to determine whether probable cause exists, it is difficult to figure out from reading these cases whether the dog alert — by itself and viewed in artificial isolation — would have been sufficient to justify the issuance of a warrant or to conduct a warrantless search under the so-called "automobile exception" to the warrant requirement.

The question is even more difficult to resolve with respect to school lockers than it is with respect to lawfully-stopped automobiles. Because drug-detection animals are extremely sensitive, it is conceivable that a dog that alerts to the outside of a given locker may actually be responding to drugs or nitrates concealed in an adjacent or nearby locker. School lockers, after all, are lined up in a row and are not hermetically sealed.

For legal purposes, each locker must be viewed as a separate and distinct "premises." A judge would not be authorized to issue a warrant to search a locker unless the judge was satisfied that there was probable cause to believe that evidence of crime would be found in that particular locker. This is not to suggest that a judge could not find probable cause to believe that drugs are concealed in any of several contiguous lockers. (Recall that the probable cause standard, by definition, deals with probabilities, not absolute certainty.) The point, however, is that in order to comply with the constitutional requirement that the warrant specifically identify the place to be searched, the judge would have to make a finding that there was probable cause to believe that drugs would be found in each and every locker to be searched. (It is common practice that where separate premises to be searched are owned or controlled by different suspects, police apply for and obtain separate search warrants, each identifying a single

place or premises, so that a copy of the warrant and a receipt for any property seized can be provided to each suspect.)

It is interesting to note that in Commonwealth v. Cass, 709 A.2d 350 (Pa. 1998), the Pennsylvania Supreme Court recently sustained the legality of a search in which school officials opened not only the lockers that were actually alerted to by the drug-detection dogs, but also the lockers adjacent thereto. Id. at 352. In a dissenting opinion, Justice Zappala concluded that the fact that the drug-detection dog had alerted on the defendant's locker, by itself, failed to establish probable cause. (The majority of the court had ruled that probable cause was not required and that the lawfulness of the search should be measured against the more flexible "reasonable grounds" standard announced in T.L.O..) Justice Zappala added:

> Implicit in the fact that it was necessary to search any lockers adjacent to those alerted on by the drug-detection dog is the conclusion that the police officers could not reasonably rely upon the dog's particularized detection. Otherwise, there would have been no reason for the officers to search the adjacent lockers.
> [709 A.2d 366, 371 (Zappala, J., dissenting).]

Some courts have expressed skepticism about dog alerts because it is thought that most of the cash in circulation in the United States contains sufficient quantities of cocaine on its surface to alert a trained dog. See United States v. $639,558.00 in U.S. Currency, 955 F.2d 712 (D.C. Cir. 1992). See also United States v. Carr, 25 F.3d 1194, 1214-1218 (3rd Cir. 1994) (Becker, C.J., concurring and dissenting) (discussing cases and studies that suggest that a substantial portion of United States currency now in circulation is tainted with sufficient traces of controlled substances to cause a trained canine to alert). Some of these cases that question the validity of a scent dog's positive alert involve situations where canine alerts were admitted as substantive evidence of guilt in a jury trial, as opposed to evidence of the existence of probable cause relied upon in a motion to suppress. Moreover, these cases involve situations where drug-detection canines were used to examine large bundles of currency to determine whether the cash was tainted or "drug related."

In the context of the school setting, however, these concerns should not be a problem, since it is not likely in any event that students (other than those engaged in significant drug trafficking or gambling operations) would keep large bundles of cash in their lockers for legitimate purposes. Indeed, the cases and studies that are critical of the use in certain specific contexts of drug-detection canines are generally based on the finding that these animals are extremely sensitive and may be alerting to slight traces of controlled substances.

It should also be noted that the failure to discover actual controlled substances in a locker alerted to by a drug-detection dog does not necessarily mean that the dog was in error. As noted in Chapter 3.2A(8), it is a well-settled principle of search and seizure law that the reasonableness of a search cannot be judged by what it turns up or fails to turn up. Drug-detection dogs react to the odor of controlled substances, not the actual concealed substances themselves. It is thus conceivable if not likely that a dog would alert to a locker in which controlled substances were recently kept, even if the cache of drugs has since been removed and is not physically present at the moment that the dog alerts and the locker is opened.

In any event, many, if not most, of the courts that have addressed the issue have ruled that a positive alert by a well-trained drug-detection dog does indeed constitute probable cause to believe that illicit substances or explosives are present. In Doe v. Renfrow, 475 F.Supp.1012 (N.D. Ind. 1979) aff'd in part 631 F.2nd at 91 (7th Cir. 1980), cert. den. 451 U.S. 1022, 101 S.Ct. 3015, 69 L.Ed.2d 395 (1981), for example, the court concluded that a scent dog's alert established probable cause to believe that a student was carrying drugs, although as it turned out, the student was not carrying drugs and the dog had apparently alerted because the student had recently handled another dog in estrus.

One respected Fourth Amendment expert has concluded that, "in light of the careful training which these dogs receive, an 'alert' by a dog is deemed to constitute probable cause for an arrest or search if a sufficient showing is made as to the reliability of the particular dog used in detecting the presence of a particular type of contraband." 1 LaFave, Wayne R., *"Search & Seizure: A Treatise on the Fourth Amendment"* (3d ed. 1996) §2.2(f) at 450.

Unfortunately, there is as yet no reported New Jersey opinion dealing with this precise issue. In a somewhat related context, however, New Jersey courts have permitted the admission of evidence concerning "tracking" by dogs. In State v. Parton, 251 N.J. Super. 230 (App. Div. 1991), for example, the court upheld the admission of testimony by a bloodhound handler that the dog had tracked the defendant from a mattress, where it was believed that the suspect had slept, to a building that had been set on fire. The court held that as a foundational basis, the proponent of the evidence must establish (1) the dog handler's skill, training, or experience to evaluate the dog's actions; (2) the dog is of a stock characterized by acute scent and power of discrimination, and that the particular animal performing the test possessed those qualities; (3) the dog was trained and reliable; and (4) the test in the particular circumstances was performed in a reliable manner.

In an unreported Appellate Division decision, which technically has no precedental value, the court viewed the Parton standards as useful in determining whether an "alert" by a drug-detection dog is deemed to constitute probable cause for an arrest or search. See State v. Lorenzo Medina, (Dkt. No. A-3683-90-T2) (Oct. 29, 1991). The court in that unreported case cited to numerous published decisions from other jurisdictions where the police had made extensive use of specially-trained dogs to detect the presence of contraband, and especially narcotics. Borrowing heavily from the standards described in Parton, the court ruled that the relevant criteria in evaluating the efficacy of a "canine sniff" test for the purpose of determining whether probable cause exists include: (1) the exact training the detector dog has received; (2) the standards employed in selecting dogs for detection training; (3) the standards the dog was required to meet to successfully complete its training program, (4) the "track" record of the dog; (5) the dog handler's qualifications; and (6) the circumstances under which the test occurred.

In that case, the prosecutor attached an extensive "resume" to the affidavit in support of the search warrant, describing in great detail the expert qualifications of the State Police dog handler, the vigorous training program that the dog underwent, and the record of the dog in detecting the presence of controlled dangerous substances. Based upon that information, the court concluded that the dog's alert constituted probable cause, even though as it turned out the dog had erred in its reaction to the defendant's automobile, in which no controlled dangerous substances were ultimately found. (As noted in Chapter 3.2A(8), just as an unreasonable search is not made good by what it happens to turn up, a reasonable search is not made unlawful merely because it fails to disclose evidence of crime.)

In light of the foregoing, it would seem that under both Federal and New Jersey law, an alert by a properly-trained and handled drug-detection canine can and does constitute probable cause, provided that all of the above-enumerated factors are clearly documented in the record. If there is any doubt in a particular instance whether the alert constitutes probable cause, the better practice would be to conduct some supplemental investigation to corroborate or bolster the alert.

In addition, before seeking a search warrant, it would be prudent for the law enforcement agency to inquire whether school officials are aware of any facts or circumstances that might suggest that the student assigned to the locker to which the dog alerted may be involved in drug activities. It would also be appropriate for the officer to check with the juvenile bureau and the prosecutor's office to determine whether there is any information in the possession of the law enforcement community

concerning that particular student. (Note that the juvenile officer should be present to provide this kind of background information [see Chapter 4.5F(3)].)

In establishing the drug-detection dog's "track record," the law enforcement agency applying for a warrant should be mindful that school lockers are, by their nature, different from other places, vehicles, or containers that are more frequently examined by drug-detection canines. As noted above, it will be necessary to establish to the satisfaction of the court issuing a warrant that probable cause exists to open a particular locker. For this reason, law enforcement officials might want to arrange controlled "test" runs in which drugs are secreted by law enforcement authorities in a few lockers to determine whether a particular dog (1) is capable of detecting the presence of drugs, and (2) is able to distinguish the locker(s) in which the drugs are actually concealed from surrounding lockers that do not contain illicit substances. The results of these practice runs should be carefully documented and made part of the affidavit in support of the warrant application.

Law enforcement authorities who volunteer the use of their drug-detection animals to aid school officials should always be mindful that the results of these inspections will become part of the animal's "track record," and that "false positive" or "false negative" alerts could undermine the future utility of the animal in criminal investigations. It bears restating, however, that the reliability of a drug-detection canine should not be called into question merely because the search of a locker alerted to by the dog fails to disclose a detectable and retrievable amount of controlled dangerous substance. Given the sensitivity of these animals, dogs can and will alert to controlled substances that were recently stored in lockers, but which have been removed and are not present at the time of the alert or ensuing search. This phenomenon must be taken into account in scrutinizing the animal's "track record."

Finally, although there are comparatively few cases that hold definitively that a dog alert — standing alone — constitutes probable cause, it would seem even more likely that the alert would meet the less stringent and more flexible "reasonable grounds" standard used to justify a search conducted by school officials. The question whether school officials may act upon the dog's alert by opening the locker in accordance with New Jersey v. T.L.O. is discussed in Chapter 4.5D(4).

D. What To Do When a Scent Dog "Alerts." In the event that a drug-detection canine alerts to the presence of illicit substances in a locker, the law enforcement handler has several options. It is critical to note that the law enforcement officer or any person acting under the direction or supervision of a police officer *is not permitted to open the locker in response to a scent dog's alert*. Rather, the officer is authorized to do one of the

following: (1) apply for a search warrant; (2) initiate further investigation to elicit additional facts indicating that illicit drugs or other contraband are concealed in the locker, or that otherwise corroborate that the student assigned to that locker is engaged in illegal conduct; (3) obtain permission or "consent" from the student and/or one of the student's parents or legal guardians to search the locker; or (4) provide information concerning the dog's alert to the principal of the school so that school authorities, acting independently of law enforcement, can take appropriate action in accordance with New Jersey v. T.L.O..

Some of these options rest on firmer legal grounds than others. It is unlikely, for example, that a reviewing court would exclude evidence or impose civil liability in any case where the search (the opening of the locker that the dog alerted to) was conducted pursuant to a warrant issued by another judge. In contrast, and for the reasons discussed in subsection 4 below, it is far less certain whether courts in this state will permit school officials to open a locker under the authority of New Jersey v. T.L.O. based upon an alert provided by a law enforcement drug-detection canine, and if that option is to be exercised, special precautions must be taken to make absolutely clear that school officials are acting independently and not as the agents of law enforcement. *Given the strong judicial preference for searches conducted pursuant to warrants, it is strongly suggested that when a scent dog alerts to the presence of illicit substances in a locker — thereby providing probable cause to believe that drugs are contained therein — the law enforcement agency conducting the operation should secure the scene and apply for a warrant*.

(1) Opening a Locker Pursuant to a Search Warrant. Before bringing a scent dog into a school to conduct a generalized inspection of the exterior surface of lockers, preparations should be made to facilitate obtaining a search warrant in the event that the dog alerts to a specific locker(s). The judge who will be called upon to issue the warrant should be put on notice of the operation so that he or she will be available to review the application expeditiously. Preferably, the application should be made "in person" pursuant to Court Rule 3:5-3(a), rather than by telephone pursuant to R. 3:5-3(b). Where feasible, the law enforcement agency should apply to a Superior Court judge, rather than a Municipal Court judge, since reviewing courts tend to provide greater deference to the probable cause determinations of Superior Court judges. See State v. Kasabucki, 52 N.J. 110 (1968). (Note also that Municipal Court judges have no authority to issue telephonic search warrants.)

Pursuant to a joint Directive from the Attorney General and the County Prosecutors' Association, an application for *any* search warrant must be reviewed and approved by an assistant prosecutor or deputy attorney general. Given the legal uncertainties in cases involving drug-detection dogs, it is especially important that these

applications be carefully reviewed by an experienced assistant prosecutor or deputy attorney general. (As noted below, the county prosecutor must in any event approve of the use of the drug-detection dog in a school, and the prosecutor's office should therefore already be directly involved in the planning and execution of the entire canine operation.)

If the assistant prosecutor or deputy or assistant attorney general reviewing the application has any doubts concerning the existence of probable cause, additional investigation should be conducted to bolster or corroborate the drug-detection dog's alert. Any additional information concerning the likelihood that the student assigned to the locker is involved in illegal activity should, where feasible, be included in the sworn application for a search warrant. Note that pursuant to the so-called "four corners" doctrine, the validity of a search warrant will be judged solely on the basis of the information provided to the issuing judge. The prosecutor is not permitted in a motion to suppress to present additional information that might have supported a finding of probable cause, but that was not provided to the judge who issued the warrant as part of the sworn application.

Information concerning the training of the drug-detection canine and the animal's "track record" should be prepared in advance and should be ready to be included in the affidavit in support of the application for a search warrant. As a practical matter, almost all of the information necessary to apply for the search warrant will be known *before* the dog alerts, and so this information should be carefully documented and stored in a word processing system so that these background facts can easily be made part of the search warrant application. Indeed, in most cases, the only facts in the application that will not be known before the drug-detection operation begins will be those that identify the specific lockers that the dog has alerted to, and those that describe the nature and intensity of the alert(s) from which the handler deduced the presence of illicit drugs in these specific locations.

The application for the search warrant should specifically identify each and every locker that is to be opened. The application must contain facts establishing probable cause to believe that drugs will be found in each locker that is to be searched. The warrant should be drafted to authorize a complete search of the contents of the locker(s), including any closed containers in the locker(s) that are capable of concealing controlled dangerous substances or drug paraphernalia.

Pending the issuance of the search warrant, the law enforcement officers involved in the operation should secure the locker or lockers for which authorization to search is being sought, so as to prevent any person from gaining access to those lockers to destroy,

conceal, or remove any contents. This may be done by replacing the original lock or by securing the latch mechanism with a plastic cable tie so that the student assigned to the locker no longer has access. Preferably, however, the scene should be secured by standing guard over the locker or hallway until a warrant is issued. This function can be performed by either police or school personnel. In some jurisdictions, police academy recruits are used to watch over the suspect lockers. (As noted above, by proper planning, the time needed to prepare an application and to appear before a judge can be kept to a minimum.) In addition, in order to minimize the intrusiveness of the search, schoolchildren ordinarily should not be present during the execution of the search warrant. (See Chapter 2.8.) It would not be inappropriate, however, and may even be preferable to have the student assigned to the locker present when the locker is opened pursuant to the warrant.

Once the locker is opened, it is advisable to take photographs of the locker before objects inside are removed and disturbed. A complete photographic (or videotape) record of the search will make it easier to establish exactly where and how any seized drugs were concealed and packaged. This information can be helpful in the event that the search results in a prosecution or trial.

(2) Obtaining Consent to Search From Students and Parents. In lieu of applying for a search warrant, law enforcement officers are authorized to obtain a knowing and voluntary consent to open a locker that has been alerted to by a drug-detection canine. (For a more complete discussion of the law governing consents, see Chapter 8.) It is important to understand that the New Jersey Supreme Court has established rules governing consent searches that are significantly stricter than the rules developed by the United States Supreme Court under the Federal Constitution.

In light of these strict rules and procedures, it is conceivable if not likely that it could actually require more time and effort to secure a lawful consent to search than to obtain a search warrant as part of a well-planned canine operation. Obtaining consent may be necessary, however, where there is a question as to whether the dog's alert constitutes probable cause to open a particular locker. (As noted in the preceding section, the canine may be alerting to drugs in adjacent or nearby lockers so that it cannot be shown to the necessary degree of probability that drugs are concealed in a specific locker.)

Under Federal and New Jersey law, law enforcement officers do not need probable cause or even reasonable suspicion to ask permission to conduct a search. See State v. Abreu, 257 N.J. Super. 549 (App. Div. 1992.) It is critical to note that permission to search a locker *cannot* be given by a school official, even though the locker is owned by

the school and the school district retains an interest in the contents of the locker. School officials simply do not have the authority to consent to a law enforcement search of a locker in which a student retains a reasonable expectation of privacy. Rather, the consent must be given by the student. In addition, a consent search should generally not be executed without first obtaining permission from a parent or legal guardian of the student if the student is a minor under New Jersey law (i.e., under 18 years of age). (Note that if the student is 18 years of age or older, or is an "emancipated minor" under the law, a parent or legal guardian might not have the authority to consent to a search. For this reason, permission to search should ordinarily not be sought from a parent or legal guardian of a student who has attained the age of majority.)

The student and parent giving consent must know that they have the right to refuse. See State v. Johnson, 68 N.J. 349 (1975). For all practical purposes, this means that the official asking for permission to search must advise the student and parent of this right. It is critical to note that the fact that the student or parent refuses to give consent cannot be used as evidence that the person has "something to hide," since any such inference would effectively and impermissibly negate the constitutionally-based right to refuse. In addition, the better practice would be to inform the student and parent that a drug detection dog has alerted to the presence of controlled substances in the student's locker. Providing this information will help to make certain that the consent is informed or "knowing," to use the phrase often found in the caselaw.

Although not required by law, the permission to conduct the search should be reduced to writing, and the form used should clearly state that the person(s) giving consent have the right to refuse. In addition, at least one New Jersey case suggests that the person or persons giving consent have the right to be present during the execution of the search. See State v. Santana, 215 N.J. Super. 63 (App. Div. 1987). This would allow the person giving consent the practical opportunity to terminate or withdraw consent at any time during the execution of the search. Any such request to discontinue the search must be respected by law enforcement. If, for security reasons, the student and/or parent is not present during the execution of the search, the better practice in view of State v. Santana, supra, would be to advise the person of the right to withdraw consent and to be present during its execution so that the prosecutor could thereafter establish that the person had knowingly waived the right to be present. (Note that *other* students ordinarily should *not* be present when the locker is opened. See Chapter 2.8.)

(3) Exigent Circumstances. Under both state and federal law, police officers are permitted, indeed, are sometimes required to enter premises and conduct searches in response to a bona fide emergency or life-threatening situation. (See Chapter 12 for a more detailed discussion of the exigent circumstances exception to the warrant

requirement.) These warrantless searches are permitted only when the circumstances are such that police officers could not reasonably have been expected to obtain prior judicial authorization or valid consent to conduct the search. In the context of planned drug-detection canine inspections, it is difficult to conceive of a situation where the police would be authorized under the exigent circumstances doctrine to open a locker in response to a drug-detection dog's positive alert. In determining the reasonableness of the police officer's conduct, reviewing courts will consider, among other things, whether that law enforcement officer used the least intrusive means to respond to the emergent situation. When a drug-detection canine alerts, the obvious and appropriate course of action would be to secure the locker, thus preventing any other person from opening it to remove or destroy evidence. Securing and watching over the locker would seem to dissipate the "exigency" of the situation, and certainly constitutes a far lesser intrusion than opening the locker without a warrant.

Accordingly, the rule is that unless the animal has clearly alerted to the presence of an explosive device, the handler or other law enforcement officer should not open the locker without obtaining a warrant or a consent to search from the student and/or parent or legal guardian. Even if the dog was trained to alert to firearms, the locker should ordinarily not be opened without a warrant or consent, since the more appropriate way to minimize both the degree of the intrusion and the danger to students or other persons would be simply to secure the locker. (Recall that as a general proposition, members of the general student population should not be present during the canine operation or subsequent execution of the search, and thus students should not be in harm's way.) Under no circumstances should a school official be asked by a law enforcement officer to open the locker to remove an object believed to be a firearm or explosives device.

(4) Using a Canine Alert to Justify a Search Conducted by School Officials. As noted in subsection C of this section, a positive alert by a properly-trained and well-handled scent dog most likely constitutes probable cause to believe that drugs or drug paraphernalia will be found in the locker or container that the dog has alerted to. It is even more likely that the dog's alert would satisfy the "reasonable grounds" standard established in New Jersey v. T.L.O. to justify a search conducted by school officials, because the standard applicable to searches conducted by school administrators is said to be more flexible and less stringent than the legal standard governing police searches.

The question thus arises, when and under what circumstances may school officials undertake a warrantless, non-consensual search on their own authority when the reasonable grounds to conduct the search is based in whole or in part upon information provided by police, such as a drug-detection canine's alert to the presence of drugs in a particular location? If school officials open a locker in response to a scent dog's alert,

will that search be governed by the rules that apply to school authorities, or to the stricter rules that must be followed by police? If a school official does open a locker in response to the alert by a law enforcement drug-detection canine, will evidence subsequently found during the course of the search be admissible in a juvenile prosecution?

There is no easy or definitive answer to these questions. The reasonableness and hence the lawfulness of any search conducted by school officials that is based in whole or in part on information provided by a law enforcement officer will depend upon the nature and degree of involvement and participation by the law enforcement agency and, to some extent, on the purpose of the search. While there are steps that can be taken to minimize the risk that a court would find the ensuing search by a school official to be unconstitutional, the safer practice is simply to avoid the problem entirely by having a law enforcement officer conduct the search in response to the canine's alert pursuant to a warrant or a recognized exception to the warrant requirement.

Recently, the Pennsylvania Supreme Court sustained the legality of a school locker search that would likely fail to pass muster under New Jersey law. In Commonwealth v. Cass, 709 A.2d 350 (Pa. 1998), a school official enlisted the aid of two police officers and a trained drug-detection dog in order to expedite the process of inspecting all 2,000 lockers in the school. When the dog alerted, a police officer, along with school officials, would open that locker and any lockers adjacent thereto. Evidence discovered in one locker was used as the basis for a criminal prosecution. Curiously, the Pennsylvania Supreme Court in a footnote concluded that although the school principal had "enlisted the aid of two police officers in conducting the search herein, we agree with the factual finding of the trial court that this search was undertaken by the school officials." Id. at 353, n.5.

Given the facts recited in the court's decision, it is highly unlikely that the New Jersey Supreme Court would similarly conclude that any such search was conducted by school officials and should thus be governed by the standards announced in New Jersey v. T.L.O.. Notably, Associate Pennsylvania Supreme Court Justice Zappala took issue with the majority's willingness to accept the "factual finding" by the trial court that the search in Cass had been undertaken by school officials. Justice Zappala observed that this finding was refuted by the record and concluded that, "to characterize the locker search in this case as a search by school officials is to engage in subterfuge. Appellee's school locker was searched by police officers and the contraband seized as a result thereof formed the basis of a criminal prosecution." Justice Zappala thus concluded that:

> A search conducted by police officers in a public school setting for the purposes of penal law enforcement, even when conducted at the request of school officials, must be supported by probable cause in order to comport with the Fourth Amendment.
> [Id. at 371 (Zappala, J., dissenting).]

It is probable if not certain that if the New Jersey Supreme Court were to be presented with facts similar to those in Cass, it would rule that the act by a police officer of opening lockers in response to the drug-detection dog's positive alert must be judged according to the stricter standards governing police searches. (The search in Cass would likely be found to be unconstitutional under New Jersey law not because of a failure to establish probable cause, but rather because the locker was opened by police without a warrant or a recognized exception to the warrant requirement.)

Even so, the question remains unsettled as to the exact nature and extent of law enforcement involvement that is necessary to trigger the full probable cause and warrant requirements. For one thing, the United States Supreme Court in New Jersey v. T.L.O. expressly declined to provide advice concerning the lawfulness of searches conducted by school administrators that involve some direct or indirect participation by law enforcement authorities, since the search at issue in that case was conducted by a school official acting without any involvement or assistance by police. The United States Supreme Court in T.L.O. remarked in a footnote that:

> We here consider only searches carried out by school authorities acting alone and on their own authority. This case does not present the question of the appropriate standard for assessing the legality of a search conducted by school officials in conjunction with or at the behest of law enforcement agencies, and we express no opinion on that question.
> [New Jersey v. T.L.O., supra, 105 S. Ct. at 743 n.7.]

The New Jersey Supreme Court, however, did not hesitate in its opinion in that case to issue a stern warning to school officials. Specifically, the New Jersey Supreme Court observed, "if it should occur that a police-initiated search employs school officials for law enforcement purposes, courts will have little difficulty in finding a subterfuge." State v. Engerud, 94 N.J. 331, 344 (1983).

In light of this admonition, Attorney General Directive 1988-1 and the Memorandum of Agreement Between Education and Law Enforcement Authorities (1992) expressly provides that:

> No law enforcement officer will direct, solicit, encourage, or otherwise actively participate in any specific search conducted by a school official unless such search could be lawfully conducted by the law enforcement officer acting on his or her own authority in accordance with the rules and procedures governing law enforcement searches.

This Attorney General Directive should not be interpreted to preclude a law enforcement officer from providing lawfully-obtained information to appropriate school authorities, even under circumstances where it is likely that school officials would use that information as the basis to conduct a search pursuant to the school official's independent authority to enforce school rules and to maintain order and discipline. Recently, the New Jersey Legislature amended and relaxed the confidentiality provisions of the Code of Juvenile Justice to make it easier for police and prosecutors to share information with schools precisely so that school officials can use that information to undertake appropriate disciplinary proceedings, to provide appropriate interventions (such as to require substance-abusing students to participate in school-based counselling programs), or otherwise to maintain order and discipline and to protect the school environment for the benefit of the entire school community. See P.L. 1994, c. 56, (N.J.S.A. 18A:37-6). These recent amendments reflect a conscious policy decision by the Legislature to permit and to encourage close cooperation and the reciprocal sharing of information between education and law enforcement professionals. (The amended confidentiality provisions codified at N.J.S.A. 2A:4A-60c are more fully discussed in Chapter 14.3 and in a joint memorandum from the Attorney General and Commissioner of Education, attached as Appendix 8 to this Manual.)

Furthermore, the Memorandum of Agreement (1992) expressly provides that:

> Nothing in this agreement shall be construed in any way to require any school official to actively participate in any search or seizure conducted or supervised by a law enforcement officer; nor shall this agreement be construed to direct, solicit or encourage any school official to conduct any search or seizure on behalf of law enforcement, or for the sole purpose of ultimately turning evidence of a crime over to a law enforcement agency. Rather, it is understood that any search or seizure conducted by school officials shall be based on the school officials' independent authority to conduct reasonable investigations as provided in New Jersey v. T.L.O.. [Memorandum of Agreement (1992), Art. II (I) ¶ 5).]

Despite this carefully worded caveat, the existence of the Attorney General Directive and the complementary rules and regulations promulgated by the State Board

of Education (N.J.A.C. 6:29-10 et seq.) give rise to a potential legal issue. New Jersey has led the nation in promoting close cooperation between education and law enforcement officials. This high degree of cooperation, which is entirely appropriate and beneficial as a matter of policy, might make it more difficult for school administrators to demonstrate to the satisfaction of a reviewing court that they are acting independently of their law enforcement colleagues, rather than as agents of the law enforcement community, when they undertake a search based on information provided by police. Consider, for example, that state law and regulations unambiguously require school officials to turn over all suspected controlled dangerous substances, drug paraphernalia, and other contraband or evidence of crime to police and to provide the police with all known information concerning where the evidence was discovered and who was in actual or constructive possession of it. See N.J.A.C. 6:29-10.4. The obvious purpose in requiring school officials to disclose the so-called "chain of custody" is to make it possible to use the seized evidence in a juvenile or adult prosecution.

This statutory and regulatory obligation invites the argument that law enforcement officers turned over information to school officials reasonably believing, if not actually knowing, that school officials would proceed to use that information to conduct a search that would reveal evidence that would then have to be turned over to police. This reciprocal arrangement might lead a reviewing court to believe that the police were essentially using school officials to conduct a search for the eventual and ultimate benefit of the law enforcement community, in which event the lawfulness of the search undertaken by the school officials would likely be judged according to the more stringent standards governing police-initiated searches.

However, a recent New Jersey Supreme Court decision strongly supports the proposition that the existence of a statute or regulation that requires civilian authorities to turn over information to law enforcement does *not* mean that the lawfulness of a search or interview conducted by those civilian authorities must be judged according to the stricter standards and rules governing police-initiated searches or interrogations. See State v. P.Z., 152 N.J. 86 (1997). The P.Z. case involved a noncustodial interview conducted by a Division of Youth & Family Services' (DYFS) worker. The Court noted that in child abuse cases, DYFS, the civil authority, must provide information about suspected abuse and neglect to the county prosecutor, the criminal authority. See N.J.S.A. 9:6-8.30a. See also N.J.A.C. 10:129-1.1a, which requires that DYFS officials "refer to county prosecutors all cases that involve suspected criminal activity on the part of a child's parent, caretaker, or any other person." (This statutory and regulatory requirement that DYFS officials turn over information to appropriate law enforcement authorities is roughly analogous to the regulatory duty that school officials have

pursuant to N.J.A.C. 6:29-10.5 to report to law enforcement authorities information concerning firearms and controlled dangerous substances. (See Chapter 14.1).)

The New Jersey Supreme Court in P.Z. rejected the defendant's argument that when "parallel" civil and criminal systems are both operating, a person must receive Miranda warnings before being interviewed in a noncustodial setting by a DYFS employee. While the Court was "sensitive to the potential for manipulation," 152 N.J. at 119, it did not find any such manipulation in the exchange of information between DYFS and the county prosecutor. In short, the statutory duty to turn over incriminating information to law enforcement did not, by itself, make the DYFS caseworker an agent of law enforcement.

In a somewhat different context involving police interrogations under the Fifth and Sixth Amendments, the United States Supreme Court has ruled that conduct by police constitutes an interrogation, which is not permitted once a suspect who is in custody has requested the assistance of a lawyer, if the police conduct is "designed or reasonably likely" to elicit an incriminating response. See Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980), cert. denied, 456 U.S. 930, 120 S.Ct. 1980, 72 L.Ed.2d 447. See also Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977). The basic idea is that police may not use clever or subtle means or "ploys" to circumvent constitutional rules if their conduct is designed or likely to accomplish that which they are prohibited from doing. If a court were to use a similar analysis in deciding whether police were using school officials to conduct searches and to find evidence that police could not obtain on their own, then it is at least conceivable that a court would conclude that school officials in these circumstances are acting as de facto agents of the law enforcement community, or at least "dual agents."

(a) The "Silver Platter" Problem. The legal issues are especially complicated in New Jersey because our courts have developed what is known as the "silver platter" rule. This doctrine deals with the situation when one government agency turns over evidence to another agency on a so-called "silver platter." The question, then, is whether the receiving agency may use that evidence in a criminal investigation and prosecution. The problem arises only when the two cooperating agencies are subject to different search and seizure rules. Recall that the New Jersey Supreme Court has on a number of occasions interpreted Article I, Paragraph 7 of the State Constitution to provide citizens with greater rights and protections than are afforded by the United States Supreme Court under the Fourth Amendment of the United States Constitution. Essentially, the search and seizure rules governing state, county, and municipal law enforcement agencies in New Jersey are different and more stringent than the rules that must be followed by federal law enforcement officers operating in this state. The

question thus arises, when can state prosecutors use evidence discovered by federal law enforcement agencies that was obtained in a way that complies with federal law, but that would have violated the stricter rules established by the New Jersey Supreme Court if the search or seizure had instead been conducted by state, county, or local police officers?

The answer, not surprisingly, depends on whether the federal law enforcement officers were acting as de facto agents for state law enforcement officers, and whether the state officers were using their federal colleagues as a clever means to circumvent the stricter rules governing searches established by the New Jersey Supreme Court. Most other jurisdictions throughout the country have not had to address this issue because their courts have harmonized their state search and seizure law with federal precedent. The "silver platter" problem only arises in jurisdictions such as New Jersey where there are two different sets of rules governing different government agencies that work together in a cooperative fashion.

The situation in which there are different search and seizure rules — one set for state, county, and local law enforcement officers and another for federal officers — is roughly analogous to the situation in which school officials are allowed to undertake searches that would be unlawful if undertaken by police. (Recall that under New Jersey v. T.L.O., school officials, in contrast to their law enforcement colleagues, do not have to meet the probable cause standard; nor are they required to obtain a search warrant before opening a student's locker or handbag.)

The silver platter cases may thus provide some indication as to how the New Jersey Supreme Court might go about determining whether school officials were truly acting independently, or whether instead they had been impressed into service by their police colleagues and were acting essentially as adjunct law enforcement officers in an effort to circumvent the probable cause and warrant requirements — what the New Jersey Supreme Court referred to in T.L.O. as a "subterfuge." 94 N.J. at 345.

In the leading silver platter case, State v. Mollica, 114 N.J. 329 (1989), the Court focused specifically on "intergovernmental agency" in determining whether for constitutional purposes the federal agents who conducted the search and seizure were acting under the "color of State law." The Court noted that the resolution of the "agency" issue requires "an examination of the entire relationship between the two sets of government actors, no matter how obvious or obscure, plain or subtle, brief or prolonged their interactions may be." 114 N.J. at 354. Moreover, the Court held that not only the reasons but "the *motives* as well for making any search must be examined." Id. (emphasis added).

The Court explained that mere contact, awareness of ongoing investigation, and the exchange of information need not "transmute the relationship into one of agency." Id. The Court warned, however, that the existence of "antecedent mutual planning" may sufficiently establish agency and serve to bring the conduct of the federal agents under the color of state law.

The Court's emphasis on the existence of "antecedent mutual planning" may create problems in the school search context, since scent-dog sweep operations necessarily require a high degree of planning and coordination if they are to be done properly and safely. (See discussion in subsection F(3).) Indeed, were a court to use this "silver platter" analysis in the context of school searches, the "antecedent mutual planning," evidenced by the invitation by school officials to bring in drug-detection dogs, coupled with the express understanding that information derived from the dog's alert would be turned over by the handler to school officials for the purpose of justifying a locker inspection, might well be enough to establish "agency," especially since school officials are thereafter required by law and regulation to turn over any seized suspected controlled substances to law enforcement authorities. Compare Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 621, n.5, 109 S.Ct. 1402, 1415, n.5, 103 L.Ed.2d 639 (1989) (discussing whether a drug testing regulation was a "pretext" to enable law enforcement authorities to gather evidence of penal law violations) with Commonwealth v. Snyder, 413 Mass. 521, 597 N.E.2d 1363 (1992) (a case cited in State v. Biancamano, 284 N.J. Super. 654 (App. Div. 1995), and in which the Supreme Judicial Court of Massachusetts held that "the fact that the school administrators had every intention of turning the marihuana over to the police does not make them agents or instrumentalities of the police in questioning [the defendant].")

Accordingly, if the search is to be conducted by school officials, careful steps should be taken to make absolutely clear that these school officials are acting independently, and that law enforcement scent dogs are being used only to assist school authorities to fulfill their bona fide educational mission, that is, to protect the school environment and to leverage substance-abusing students into counselling programs.

Preferably, the record should clearly indicate that school officials initiated the request to bring drug-detection dogs into the schools, and any correspondence to that effect should be kept on file and made part of the record in any court challenge. (Recall that the New Jersey Supreme Court in T.L.O. referred specifically to "police-initiated" searches. 94 N.J. at 345.) Needless to say, however, there is and should be no blanket policy that prohibits a law enforcement agency from soliciting such an invitation, or that otherwise prevents police departments from making known to education officials that drug-scent dogs can be made available upon their request.

Furthermore, if the operation provides that lockers are to be opened by school officials, then the record should make clear that school officials have sought out the services of police scent dogs for the principal and dominant purpose of maintaining order and discipline and to identify substance-abusing students who are in need of school-based interventions and counselling. Under no circumstances may a law enforcement agency direct that dogs be brought into schools to conduct suspicionless sweep searches. Nor may law enforcement officials plan or execute any such operation over the objection of school authorities, which objection may interposed at any time, including after the operation has commenced. (See subsection F(7).)

It is also recommended that the canines and their handlers and other law enforcement officers that may be participating in the operation not be present or even "standing by" when the locker(s) is actually opened by school officials, since such attendance or proximity — "waiting in the wings" — could foster the appearance that school officials were merely acting as agents of the law enforcement community.

Under no circumstances should the scent dog be allowed to conduct a further warrantless examination of containers or objects such as bookbags or knapsacks that were revealed and exposed after a locker has been opened by school officials in response to the dog's initial alert to the exterior surface of the locker. In other words, the police-owned or handled canine should not be used after the locker is opened by school officials to focus their ongoing warrantless search to containers founds within the locker, even if school officials facilitate the subsequent canine inspection by removing the containers from the locker so that the canine does not have to physically enter the locker.

For one thing, such further direct involvement by police in the ongoing search is not necessary because if school officials may lawfully open the locker in response to the dog's initial alert (which is not certain), then they may further search any object or container within the locker that could reasonably conceal the drugs or drug paraphernalia that are the object of the search.

Furthermore, while it could be argued that the use of a drug-detection dog at this point actually serves to minimize the intrusiveness of any further search by making it unnecessary for school officials to open any objects or containers found in the locker that the dog does not specifically alert to, see Commonwealth v. Cass, 709 A.2d 350, 362 (Pa. 1998) (court in upholding canine search emphasized that dogs were specifically employed to limit the intrusion occasioned by the decision to search all lockers in the school), it is more likely that courts will construe the continued use of the dog in these circumstances as proof that police were integrally involved in the entire search episode, blurring if not emasculating the distinction between searches conducted by school

officials and those conducted by police. In other words, keeping the police canines on the scene after the locker is opened and using the dogs as a screening device at this juncture — after a true "search" had already been initiated — would likely lead courts in this state to conclude that the canine sniffs and the searching conduct by school officials were all "part of a single transaction as connected units of an integrated incident." Compare State v. Bradley, 291 N.J. Super. 501 (App. Div. 1996) (using the above-quoted phrase to determine whether a search incident to an arrest is contemporaneous with the arrest). Any such "integration" of education and police functions is likely to transform the operation, for Fourth Amendment purposes, into a law enforcement search.

(b) The Problem of "Parallel" Criminal and Non-Criminal Investigations. Several New Jersey cases have discussed another variation of the "silver platter" problem that can arise when there are simultaneous or "parallel" criminal and civil investigations into the same conduct. As noted in Chapter 14.4, school officials are permitted to conduct their own investigations and to initiate appropriate disciplinary proceedings even where a formal juvenile (or adult) prosecution is still pending. In other words, it in no way constitutes "double jeopardy" for law enforcement and school officials to conduct independent, "parallel" investigations and disciplinary/prosecution proceedings. School officials should, of course, always be cautious not to inadvertently undermine an ongoing law enforcement investigation or juvenile prosecution, and the existence of parallel investigative proceedings may implicate a degree of cooperation and interaction that would lead a court to conclude that school officials and law enforcement officials were acting in concert, so that a resultant search or interview conducted by a school official would be judged by the stricter legal standards that apply to searches or interviews conducted by police and prosecutors.

In State v. P.Z., 152 N.J. 86 (1997), the New Jersey Supreme Court cautioned that in cases where there is an interrelationship between criminal and civil actions against the same person, courts must be "sensitive to the potential for the state's deliberately manipulating a civil procedure in order to obtain evidence against a criminal defendant." 152 N.J. at 118. The P.Z. case involved a child abuse investigation by the Division of Youth and Family Services (DYFS). Pursuant to statute and regulations, DYFS, the civil authority, is required to provide information about suspected abuse and neglect to the county prosecutor, the criminal authority. See N.J.S.A. 9:6-8.36a and N.J.A.C. 10:129-1.1a. As noted above, the New Jersey Supreme Court in P.Z. expressly rejected the contention that because "parallel civil and criminal systems are both operating against a defendant," DYFS officials must provide the so-called Miranda warnings to the defendant before conducting a noncustodial interview. While the New Jersey Supreme Court was sensitive to the potential for manipulation, it found no

impropriety in the exchange of information between DYFS and the county prosecutor in that case.

Critical to that determination was that at the time of the interview, the DYFS worker was acting within the scope of her duties to investigate and establish a placement plan for defendant's infant daughter, who was shortly to be released from the hospital following injuries suffered at the hands of the defendant. The interview, in other words, was done in furtherance of a bona fide DYFS investigation and was done to obtain information relevant to the proper discharge of that civil agency's responsibilities.

As importantly, there was no indication that the DYFS worker interviewed defendant with the purpose of aiding in the criminal prosecution, or that she had a "hidden agenda" to obtain an incriminating statement on behalf of the prosecutor's office. The Court noted that the record in that case contained no reference to regular interaction between the civil and criminal authorities, let alone "manipulation" of the DYFS caseworker by the prosecutor to obtain information specifically to help the criminal authorities. The Court nonetheless cautioned that had there been evidence that the DYFS worker had met with the defendant simply as a subterfuge to achieve a law enforcement purpose, it might well have reached a different result. 152 N.J. at 120.

Justice Pollock in his dissenting opinion, which was joined by Justice Coleman, read the record differently, concluding that the caseworker had been acting for *both* DYFS and the county prosecutor. According to Justice Pollock, even if the caseworker was acting primarily to protect the best interests of the injured child, she was also acting on behalf of the county prosecutor. "In sum," Justice Pollock concluded, "[the DYFS caseworker] was a dual agent." The "proof of the pudding," according to Justice Pollock, was that the county prosecutor had *authorized* the DYFS worker to take a statement. 152 N.J. at 128-129. (Pollock, J., dissenting).

In light of the P.Z. Court's clear warning, and especially in view of the concerns raised by the dissent, it is critically important that county prosecutors or other law enforcement officials never attempt to use or manipulate school officials to undertake a search (or to conduct an interview) for the purpose of aiding the county prosecutor in conducting a criminal investigation. Any search or interview undertaken by school officials must be done in furtherance of the school official's independent responsibility to maintain order, discipline, and safety within the school. Although county prosecutors are expressly authorized to provide legal advice to school officials pursuant to Attorney General Directive 1988-1, see also Chapter 14.5, a county prosecutor should never direct, recommend, or even "authorize" school officials to undertake a search or conduct

an interview. Rather, the prosecutor should only advise the school officials whether the contemplated search (or interview) is likely to be judged to be lawful or unlawful.

(c) Determining the "Purpose" of the Search — The Immunity Problem. The United States Supreme Court in its recent landmark opinion dealing with student athlete drug testing programs distinguished between searches undertaken for "prophylactic and distinctly *non*punitive purposes" and those that the Court characterized as "evidentiary" searches. Vernonia Sch. Dist. 47J v. Acton, 115 S.Ct. 2386, 2393 n.2 (1995) (emphasis in original). This analytical distinction appears to be consistent with the reasoning used by the New Jersey Supreme Court in the "silver platter" case discussed in subsection (a), wherein the state court carefully examined the "motivations" of the participants.

A number of well-reasoned and frequently-cited cases in other jurisdictions similarly suggest that the "purpose" of the search undertaken by school officials in response to a police scent dog's alert is relevant if not of critical importance in determining whether the search is lawful. In Zamora v. Pomeroy, 639 F.2d 662 (10th Cir. 1981), an assistant district attorney contacted the principal of a school who in turn received permission from the school superintendent to use drug-detection dogs to conduct a general sweep. The resulting search was done pursuant to a state board of education regulation that prohibited the sale, possession, transportation, or use of marijuana on school premises. The state board of education regulation included a provision that authorized general searches of school property, including lockers and school buses, declaring that such inspections may be conducted at any time with or without students being present. Students were advised of this policy by means of a publication that was provided to students at the beginning of the school year.

The United States Court of Appeals for the 10th Circuit found in that particular case that:

> Although the search of the lockers and use of the dogs was brought about by the district attorney, the district attorney assured the school officials that he was not doing it in any official capacity; that no charges or arrests would be made as a result of the demonstration; and that if marijuana was found the decision as to action against the offender would be left to the school authorities. The search (so it was argued) was performed under the sole control and direction of [the principal] and not the assistant district attorneys, who were just there as observers.
> [639 F.2d at 666.]

The 10th Circuit Court of Appeals ultimately decided that this search did not violate students' Fourth Amendment rights, and that the plaintiff in the civil action suffered no compensable injury when he was transferred to another school after marijuana was discovered in his locker during a warrantless search by school officials that was based upon the drug-detector dog's alert to the presence of marijuana inside his locker.

A similar result was reached by a federal district court in Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979) remanded in part and affirmed in part, 631 F.2d 91 (7th Cir. 1980), cert. den. 451 U.S. 1022, 101 S.Ct. 3015, 69 L.Ed.2d 395 (1981). In that case, a drug-detection canine was used to walk up and down classroom aisles to inspect students. The district court's opinion in Renfrow, which was described as "scholarly" and adopted by the 7th Circuit Court of Appeals and has since been cited by a number of other courts and commentators, ultimately concluded that school officials may rely on general information to justify the use of law enforcement canines to detect drugs, and that the "probable cause" standard governing police searches does not apply in this situation. The district court in Renfrow observed:

> Acting alone, each school administrator could have unquestionably surveyed a classroom to prevent drug use. Because those administrators now acted with assistance of a uniformed officer does not change their function. The officers were merely aiding in the inspection, at the request of the school administrators. Their presence does not change the actions of the school officials from that of supervision in loco parentis to that of an unwarranted search. Although they were obviously clothed with their state authority, they [law enforcement officials] had previously agreed that no arrests would be made as a result of any drugs found that morning. No police investigations took place on that day nor had any arrests or prosecutions been initiated as a result of the March 23, 1979 inspection. [Renfrow, 475 F. Supp. at 1020 (emphasis added).]

The court concluded that there is nothing improper in having school officials use dogs as aides to supplement and assist basic human senses. "In doing so," the court noted, "it should be emphasized that the defendants [the school officials] proceed as school officials and not, per se, as policemen." Id. at 1026.

The court in Renfrow nonetheless issued a warning that the results might have been different had law enforcement agencies made any arrests or pursued criminal prosecutions:

> It should be noted at this point that had the role of the police been different, this Court's reasoning and conclusion may well have been different. If the search had been conducted for the purpose of discovering evidence to be used in criminal prosecution, the school may well have had to satisfy a standard of probable cause rather than reasonable cause ... [Id. at 1024.]

The Renfrow case is often cited for the proposition that school officials may rely on a drug-detection canine's alert to undertake a search provided that no criminal prosecution is initiated based upon any evidence discovered during the search. It is unclear under this line of precedent whether it matters that there was a secondary or incidental purpose to the search, or whether police and prosecutors are indeed flatly prohibited from initiating a prosecution that relies on any such evidence found by school officials in these circumstances, although these cases strongly suggest that evidence would *not* be admissible in a criminal prosecution.

This approach, however, seems to conflict with the principle that the presence of both administrative (i.e. health and safety) and criminal investigative purposes does not automatically invalidate an otherwise lawful administrative search, provided that the "*primary object*" of the search is not to gather evidence of criminal activity. See Michigan v. Clifford, 464 U.S. 287, 294, 104 S.Ct. 641, 647, 78 L.Ed.2d 477 (1984). It must be recognized, of course, that in the context of a schoolwide inspection — especially one that involves a sweep by drug-detection canines — the "object" of the search, illicit drugs, happens also to constitute evidence of criminal activity. Where scent dogs are used, it can hardly be argued that the ensuing discovery of drugs was inadvertent within the meaning of the "plain view" doctrine. This is not a situation, in other words, where the administrative inspection is undertaken to find one type of object, but another type is revealed, although it certainly could be argued that a canine sweep designed to find drugs should not foreclose prosecution for possession of firearms or other deadly weapons. In sum, it is not clear whether courts will focus on the primary *objective* or *purpose* of the inspection program (compare the New Jersey Supreme Court's reference in T.L.O. to a "narrow band of administrative searches to achieve educational purposes," 94 N.J. 331, 343-344), or the primary *object* of the inspection which, in this context, is illicit substances that constitute not only a violation of school rules and a threat to the educational process, but also constitute a violation of the criminal law.

There are several other difficulties in relying on these school search cases that were decided in other jurisdictions. For one thing, the courts in both Renfrow and Zamora relied to some extent on the special relationship between school administrators and students under the doctrine of "in loco parentis" — the notion that school officials

at times are acting not as governmental agents, but rather in the stead of parents. In Zamora, for example, the court observed:

> The particular relationship between Vidal [the student who brought the civil rights action] and the school authorities serves to distinguish this case from the search and seizure cases which are relied on by the plaintiff-appellant. The basic theory is that although a student has rights under the Fourth Amendment, these rights must yield to the extent that they interfere with the school administration's fundamental duty to operate the school as an educational institution and that a reasonable right to inspect is necessary in the performance of its duties, even though it may infringe, to some degree, on a student's Fourth Amendment rights. The courts which have considered this question have noted that the doctrine in loco parentis expands the authority of school officials, even to the extent that it may conflict with the rules set forth in the Fourth Amendment. Some cases have gone so far as to say that school authorities have an affirmative duty to search the lockers.
> [Zamora, 639 F.2d at 670.]

The problem with this analysis is that the United States Supreme Court in New Jersey v. T.L.O., which was decided four years after Zamora, questioned if not outright rejected the argument that the doctrine of in loco parentis provides a basis for conducting a search under the Fourth Amendment. While the United States Supreme Court ultimately imposed a different and less stringent standard for searches conducted by school officials, as compared to searches conducted by police, the Court did *not* embrace the notion that school officials are acting in the stead of parents, who are, of course, free to conduct searches of their minor children's property and possessions without any constitutional limitations. The United States Supreme Court in T.L.O. noted in this regard:

> If school authorities are state actors for the purposes of the constitutional guarantees of freedom of expression and due process, it is difficult to understand why they should be deemed to be exercising parental rather than public authority when conducting searches of their students ... in carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the state, not merely as surrogates for the parents, and they can not claim the parents' immunity from the strictures of the Fourth Amendment.
> [New Jersey v. T.L.O., 105 S.Ct. at 733, 740.]

Our ability to rely confidently on Doe v. Renfrew and the cases that cite to it is also called into question by the blistering dissent of Justice Brennan to the decision by the United States Supreme Court to deny certiorari in that case. (Denying certiorari means that the Court decided not to review the case on its merits.) Justice Brennan in his dissent to the denial of certiorari in Renfrow wrote:

> Moreover, even if the Fourth Amendment permits school authorities, acting in loco parentis, to conduct exploratory inspections if they have "reasonable cause" to believe contraband will be found, that standard could not apply where, as here, the school officials planned and conducted the search with the full participation of local police officials. Once school authorities enlist the aid of police officers to help maintain control over the school's drug problem, they step outside the bounds of any quasi-parental relationship and their conduct must be judged according to the traditional probable cause standard.
> [Doe v. Renfrow, 451 U.S. 1022, 1026, 101 S.Ct. 3015, 3018, 69 L.Ed.2d 395 (1981).]

To further complicate the situation, there are yet other practical as well as legal problems that must be addressed if law enforcement agencies are to provide the services of drug-detection dogs with the understanding that school officials — not police officers — will eventually open lockers in the event of a positive alert, and with the further understanding that any evidence of crime found in the lockers will not be used in either a juvenile or adult prosecution.

First, the decision to decline prosecution, which can *only* be made by a county prosecutor or the Attorney General, presupposes that the need to use this particular technique (i.e., having school officials rather than police open lockers in response to a scent dog's positive alert) outweighs the benefits of preserving the option of pursuing full prosecution. This means that officials must rely entirely on school-based disciplinary proceedings to achieve the desired deterrent effect, since a criminal prosecution would no longer be a viable option. Prosecutors and school officials must proceed cautiously before taking this tact, since it might unwittingly send a mixed signal to students, undermining the state's "zero tolerance" policy.

As importantly, county prosecutors must be extremely careful before agreeing to give up the option to initiate a prosecution before all (or, in this context, any) of the facts are known. Ordinarily, the decision to grant immunity from prosecution is made only after thoughtful deliberation and a careful assessment of all of the attending circumstances, including, notably, the culpability of the person who is being afforded protection from criminal prosecution. Under state law, prosecutors who seek to provide formal immunity must apply to a court and must first receive express permission from the Attorney General. See N.J.S.A. 2A:81-17.3. In the context of a school search, in contrast, a prosecutor is being asked to give up the right to use evidence even before that evidence is found and before any facts or even the identities of putative defendants are known.

Note, moreover, that if the prosecutor broadly agrees not to use evidence found in a search conducted by a school official pursuant to a drug-detector dog's alert, that prosecutorial decision would seem to extend to *any* evidence found in the locker that would be deemed to be a "fruit" of the search. This might include large quantities of drugs that suggest major drug *distribution* activities, and any weapons or firearms found in "plain view" during the execution of the locker suspected of concealing drugs and alerted to by the scent dog.

Such "blanket" immunity stands in sharp contrast to the carefully-drawn amnesty feature set forth in the Memorandum of Agreement Between Education and Law Enforcement Officials (1992) and N.J.A.C. 6:29-10-4(a)(1), which is discussed in Chapter 14.1C of this Manual. That feature is expressly limited to cases involving the simple possession of drugs for personal use, *not* the distribution or possession with intent to distribute controlled dangerous substances. Nor does the amnesty feature apply at all to firearms or other dangerous weapons.

Pursuant to this so-called amnesty provision, the Attorney General and the State Board of Education have adopted a policy whereby law enforcement has agreed to give up its right to pursue a criminal investigation and prosecution of comparatively minor drug offenses. This is done to achieve a compensating benefit, that is, to provide a strong incentive for substance-abusing students to voluntarily and on their own initiative turn over drugs and to seek help for their substance abuse problem. The New Jersey Legislature has since embraced a similar policy when it adopted N.J.S.A. 2C:35-10c, as interpreted by State v. Patton, 133 N.J. 389 (1993), which held that a person who voluntarily turns over drugs to law enforcement authorities is afforded implied immunity and may not be prosecuted for the simple possession of those drugs.

For all of these reasons, if school employees rather than police are to conduct searches in response to a scent dog's alert (which is *not* recommended), the better practice would be for the county prosecutor to agree only that his or her office will not prosecute a student for a violation of the statute that prohibits simple possession of illicit drugs. The county prosecutor is strongly encouraged to retain and expressly preserve the option of using any evidence found by school officials to prosecute for more serious crimes, including distribution or possession with intent to distribute illicit drugs, or the unlawful use or possession of a firearm or other dangerous weapon. This must be done, of course, with the understanding that a defendant will almost certainly move to suppress *any* evidence of serious criminal activity discovered in the search and that it is conceivable if not likely that the defendant would prevail in a motion to suppress under the authority of Renfrow, Zamora, and other cases that suggest that criminal prosecution is foreclosed. (As noted above, it is somewhat more likely that a prosecution for possession of firearms or other deadly weapons would *not* be precluded where the "primary object" of the sweep inspection was to find drugs, not weapons. The ensuing discovery of weapons in a locker alerted to by a drug-detection dog would seem to meet the elements of the "plain view" exception, which is discussed in more detail in Chapter 11. See Michigan v. Clifford, 464 U.S. 287, 294, 104 S.Ct. 641, 647, 78 L.Ed.2d 477 (1984).)

Given the legal uncertainties involved and the distinct possibility, if not probability, that a prosecution for serious offenses might be precluded, prosecutors are strongly urged to employ other search techniques in response to a scent dog's alert, such as obtaining a warrant or a valid consent. It must be recognized, however, that some school officials believe that it is preferable to rely entirely on school-based disciplinary proceedings, and they will not invite law enforcement officers and dogs on to school grounds if their students will be subject to prosecution. In these districts, the only way to make use of scent dogs is for the prosecutor to agree to forego prosecution. Prosecutors and police departments would seem to have little to lose in agreeing to these terms, since in the absence of such a blanket concession, drug-detection dogs would not be allowed to examine the exterior surfaces of lockers or other property and would thus not be in the position to alert to the presence of drugs, which would remain concealed and undetected.

Even so, this approach seems to be based on a misunderstanding of the nature and workings of the juvenile justice system, and may even reflect an implicit lack of respect and trust for that system and the ability of police, prosecutors, and juvenile courts to handle cases properly and fairly. It is simply inappropriate, as a matter of state policy, for school officials to insist that major drug dealers or those who carry firearms on to school grounds be guaranteed immunity from juvenile or (where applicable) adult

criminal prosecution. Accordingly, county prosecutors are strongly urged not to give up the right to prosecute for serious drug distribution or weapons offenses, even if this means that drug-detection canines will not be invited into a school to conduct a sweep.

Finally, it almost goes without saying that prosecutors cannot give up the right to pursue a prosecution because they know or believe that a planned search — one that has not yet taken place — will be unlawful and that any evidence seized will be inadmissible on those grounds. Thus, for example, a prosecutor may not direct, encourage, or permit law enforcement officers to conduct or actively participate in a search conducted without a warrant unless there is a good faith reason to believe that the search would fall under one of the judicially-recognized exceptions to the warrant requirement. Any government official who knowingly or purposely violates a student's constitutional rights is subject to *punitive* damages, departmental discipline, or even criminal prosecution for misconduct, notwithstanding that the official fully intended to minimize the adverse effects on the students whose rights were violated by agreeing in advance not to use seized evidence against these students in a juvenile or adult criminal prosecution.

E. Using Canines to Examine Student Property Other Than Lockers or Desks. Ordinarily, the use of drug-detection canines to conduct suspicionless or "sweep" examinations should be limited to the exterior surfaces of lockers, desks, and other fixed or immovable property in the school. Some school officials are justly concerned, however, that drugs are routinely carried by some students from class-to-class in portable containers or in students' clothing. Some drug using or selling students are afraid to leave controlled substances in their lockers for fear that they will be discovered by school officials through the use of drug-detection dogs or random locker inspection programs. Drug-dealing students are even more reluctant to leave valuable stashes of drugs or the proceeds of drug sales behind in unprotected lockers for fear that their drugs and drug-related cash would be "ripped-off" by other students or competitors. For this reason, many school administrators think it is necessary and appropriate to conduct suspicionless examinations of students' handbags/purses, bookbags, knapsacks, and clothing.

As noted in Chapter, 4.5.B, using a drug-detection canine to examine the exterior surface or air surrounding an opaque, closed container or article does not reveal anything private about its contents, and thus constitutes an extremely limited form of privacy intrusion. Some school officials would therefore prefer to use scent dogs as a screening device to assist them in conducting these initial examinations of moveable property, since a program that subjects such property to examination by a canine is *less* intrusive than a program that permits school authorities to open randomly-selected handbags,

bookbags, or knapsacks, or that allows school officials to conduct searches of these kinds of containers when students enter or leave a school building or a designated area within the school, such as the library or media center. (See discussion of "Point of Entry" Inspections in Chapter 4.6.)

(1) Using Canines to Search Persons and Clothing. It is a regrettable fact of modern day life that some students carry drugs and weapons on their persons from class-to-class throughout the course of the school day. Concealing contraband is especially easy for students who wear multiple layers of baggy or loose-fitting clothing, which has become fashionable in recent years. This fashion trend, ironically, was initiated or at least embraced by gang members in California who realized that loose-fitting clothing could be used to conceal firearms and other deadly weapons. (This is not to suggest, of course, that all or even a substantial percentage of students who wear oversized clothes are trying to conceal drugs or weapons.)

Despite the severity of the drug and weapons problem facing our schools, it is inappropriate in this state to use scent dogs to examine student's persons, including articles of clothing while such clothing is being worn by a student. In New Jersey, as in most states, scent dogs are generally trained to use active or aggressive alert cues or "keys," including scratching, pawing, barking, and growling. Allowing dogs with active alert cues to sniff students poses an unacceptable risk to the safety and well-being of students.

In the case of Jones v. Latexo Indep. Sch. Dist., 499 F.Supp. 223 (E.D. Tex. 1980), the court ruled that it was unreasonable and thus unlawful to use a scent dog to examine children. Interestingly enough, it made no difference in that case that the dog was owned and handled by a private security company, rather than by a law enforcement agency. The court in Latexo noted that, "the use of a 'sniffer' dog by defendant [school district] in the instant case was a substantially greater intrusion upon the personal privacy of plaintiffs ... first, the students themselves, not merely their vehicles or possessions, were subjected to canine scrutiny." 499 F.Supp. 223, 232. Professor LaFave, a noted expert on the Fourth Amendment, has commented that the court in Jones seems to have been strongly influenced by the fact that school authorities used especially poor judgment in that case by having the dog inspect virtually the entire Latexo student body, including even kindergarten children. 4 LaFave, supra at 819.

School officials and law enforcement agencies that own and handle drug-detection canines must also be mindful that police dogs, even scent dogs, may evoke painful memories of past governmental overreaching in Europe and the United States. In some communities, the use of police-controlled animals to search or intimidate persons —

especially children — will be met by a visceral negative reaction. It is incumbent upon the county prosecutor before approving the use of a police canine to anticipate and account for any such reactions and any civil disturbances in the school or the community-at-large that might result from the proposed use of a police canine. As noted in Chapter 4.5F(2), law enforcement officials are strongly encouraged to solicit parental input before undertaking *any* canine operation in a school.

The next question that arises is whether school officials are authorized to order children to remove their outer garments and to leave those garments behind so that they can be examined by a drug-detection dog. This conduct would appear to be a "seizure" — the temporary dispossession of the use and enjoyment of personal property. The legality of ordering children to leave behind personal articles is discussed in more detail in the following section regarding the use of canines to inspect handbags, backpacks, and other portable containers. For present purposes, it is enough to note that the lawfulness of the conduct will depend on several factors, including the need to undertake this form of inspection (the specific findings) and the degree of intrusion.

School officials should carefully document the reasons that necessitate this type of inspection based on the nature and extent of the drug or firearms problem in the particular school or district. (Note that the scope of the firearms problem will be relevant only to the extent that the canines to be used are trained to alert to the presence of firearms or ammunition.) Any such orders to partially disrobe and to leave clothing behind for examination by a scent dog must be limited to students' outer garments, such as jackets and coats. Under no circumstances may a school require students to remove clothing to a degree or in a manner that would constitute a "strip search" for the purpose of exposing the removed clothing to a suspicionless "sweep" inspection by a drug-detection dog. Recently, Governor Whitman signed a law that flatly forbids school officials from conducting strip searches of students even in cases where school officials have an individualized suspicion that a particular student is carrying a weapon or illicit drugs. (See Chapter 10 for a more detailed discussion of strip searches conducted by school officials.)

Presumably, school administrators have the authority to impose reasonable restrictions on the use of certain forms of clothing, and can, for example, impose an appropriate dress code. A school may also require students to keep outer garments stored in lockers or other places or facilities that are provided by the school for student use during the school day. If the drug problem that exists in a school is such as to justify the use of drug-detection dogs to examine students' outer garments, it might be appropriate for the school to adopt and enforce a rule requiring that such articles of clothing be kept in lockers and out of classrooms. By requiring students to keep such

garments stored in lockers, school authorities can make it more difficult or at least more inconvenient for drug dealers to conceal controlled substances or weapons during the course of the school day. Any such policy, if consistently enforced, is likely to have a greater beneficial impact than a policy to subject outer clothing to comparatively infrequent inspections by drug-detection canines.

In the event that school officials nonetheless wish to establish a program that requires students to remove clothing only during the course of a canine inspection, any such order addressed to a student to remove or leave behind outer garments must be done pursuant to a neutral plan. The class or classes subject to this type of inspection should be selected at random, or else all classes (or at least those with children of an appropriate age given the documented nature of the problem) should be subjected to equal treatment. Individual students within a classroom should *not* be singled out for this form of inspection. If school officials have reason to suspect that a particular student or group of students is carrying concealed drugs or other contraband, the appropriate response is to conduct an individualized search in accordance with the standards established in New Jersey v. T.L.O. and discussed in detail in Chapter 3.

The plan should include provisions to ensure the security of student garments that are left behind, protecting them against the risk of theft, loss, or destruction. The plan should ensure that the movement of students during the operation is done in a safe and orderly way, and the plan should include provisions to make certain that students avoid direct contact with drug-detection animals.

In directing or controlling the movements of children pursuant to this type of inspection program, school officials should always be mindful that while schools exercise considerable authority over students for their benefit and protection, *schools are not prisons, and students are not inmates*. (See Chapter 2.12.) The plan should avoid using terms that are more appropriate for correctional institutions, such as "lock-downs." Prisoners are afforded comparatively few rights under the Fourth Amendment because they have been convicted of serious crimes and have been sentenced to custodial terms. See Ingraham v. Wright, 430 U.S. 651, 657, 97 S.Ct. 1400, 1411, 51 L.Ed.2d 711 (1977); Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984). School officials and law enforcement agencies must never lose sight of the fact that most students do *not* use, carry, or sell illicit drugs or dangerous weapons on school property, and that suspicionless inspection programs are designed to deter and to ferret out the comparative handful of students whose unlawful and dangerous behavior disrupts the sanctity of the educational environment. The Pennsylvania Supreme Court recently recognized that the goal of safe, drug-free schools "is often impeded by the actions of a few students which interfere with the ability of the [state] to achieve this goal."

Commonwealth v. Cass, 709 A.2d 350, 364 (Pa. 1998). School officials in their zeal to deter the dangerous and unlawful behavior of a few troublemakers should not use tactics that serve unwittingly to breed disrespect for authority or that unduly disrupt the educational process.

Finally, it is essential that students and their parents or legal guardians receive advance notice that the school intends to use — or at least retains the right to use — this particular inspection technique, and that students may be required without further notice to vacate a classroom and to leave behind outer garments that will be subject to inspection by a drug-detection canine.

(2) Using Canines to Examine Backpacks, Handbags, and Other Portable Containers. As noted in the preceding subsection, some students routinely carry drugs and other prohibited items from class-to-class in bookbags, backpacks, and similar containers. In several districts throughout New Jersey, school officials have invited law enforcement agencies to bring in drug-scent dogs, and, during these operations, students in randomly selected classrooms have been directed to vacate the room, leaving their personal possessions behind to be examined by the canines.

Once students leave the room, the drug-detection canine is brought in to inspect the exterior surfaces of the student's bookbags and other similar containers. If the dog alerts to the presence of controlled substances, law enforcement officers secure the scene or seize the objects suspected to contain illicit drugs. Law enforcement officers immediately apply to a judge for a warrant to open these containers to inspect their contents to confirm or dispel the suspicion that they contain evidence of crime. (Note also that because a bookbag or knapsack can be moved and separated from nearby containers, unlike a fixed locker, a scent dog's alert is especially likely to establish probable cause, since there is little chance that the dog is actually alerting to drugs concealed in a separate but adjacent container.)

In some operations, the dog's alert is communicated to school officials, who then open the container on their own authority, without a warrant, pursuant to the rule established in New Jersey v. T.L.O.. For the reasons expressed at length in Chapter 4.5D(4), the preferred practice is to have law enforcement officers conduct the search pursuant to a warrant or a recognized exception to the warrant requirement.

This use of drug-detection canines to inspect handbags, backpacks, and similar articles that students were ordered to leave behind raises a number of additional issues beyond those that arise in scent dog operations that are limited to inspecting lockers. For one thing, the act of ordering students to leave their possessions behind during an

operation so that those possessions can be examined by a scent dog would seem to constitute a type of "seizure," which must itself be reasonable under the Fourth Amendment.

In defending this type of inspection program, it is first critical to note that this approach — requiring children to leave their personal possessions in place and to vacate the room — is less intrusive and thus preferable to an operation that permits a drug-detection dog to enter a classroom while students are still present. As noted in the preceding subsection, a dog handler should never allow a scent canine to come into direct contact with school-aged children, except as part of an assembly or classroom demonstration where the handler is certain that the dog will not attack or frighten children.

Although the act of ordering students to leave their possessions behind constitutes a type of seizure, it must be remembered that not all seizures are unreasonable under the Fourth Amendment. Indeed, as noted in Chapter 2.2, a seizure generally represents a far less serious intrusion on Fourth Amendment rights than a search. Furthermore, the law does not always require that government officials have a particularized suspicion of wrongdoing before a person or vehicle can be seized or ordered to stop. Indeed, the concept of temporarily dispossessing luggage from a passenger and subjecting that luggage to routine examination by means of metal detectors and x-ray machines is universally accepted in the context of airports, where bona fide security concerns are especially pronounced.

It is also well-settled under both federal and state law that law enforcement officers may set up sobriety checkpoints where vehicles selected at random are ordered to stop for a brief inspection to determine whether the persons operating these vehicles are driving under the influence of an intoxicating substance or without proper credentials. These temporary detentions or "seizures" are permitted so long as the law enforcement agency has identified a need for the operation; the detention is limited to roads and times where drunk driving is a special problem based upon documented facts; the seizures are done in a safe manner that reduces the risk of injury to motorists and law enforcement officers; and the operation is conducted pursuant to a neutral plan, developed and approved by appropriate superiors, and designed to minimize the discretion of officers in the field. See State v. Kirk, 202 N.J. Super. 28 (App. Div. 1985) and Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990).

Arguably, the temporary dispossession of property that occurs when students are required to move to a different classroom and to leave their belongings behind represents

a lesser intrusion on Fourth Amendments rights than occurs when police order a vehicle to pull over as part of a DWI checkpoint and credentials inspection. While in school, students enjoy only limited rights of freedom of movement and to enjoy the use of personal property. (See cases cited in Chapter 1.5B defining the term "seizure" as used in this Manual.) School officials, for example, may, without running afoul of any constitutional provision, order students to attend specified classes or assemblies, or to go to designated places within the school for safety and security purposes, such as during fire drills. So too, school districts may promulgate rules that require students to keep personal possessions in lockers or other designated areas during the course of the school day.

If schools are to conduct this type of canine inspection program, it is nonetheless strongly suggested that they carefully document the reasons that justify this particular inspection technique, setting out factual findings that demonstrate why it is thought that unknown students routinely carry drugs or other contraband from class-to-class in portable containers. School officials should also carefully document existing rules and regulations governing the use of these containers, since the existence and enforcement of these regulations provide evidence of the authority of the school to control their use and movement.

The decision to order students to vacate a classroom and to leave their personal possessions behind should be done pursuant to a neutral plan that minimizes the discretion of school employees. The classroom(s) subject to this form of canine inspection should be selected at random, or else all classrooms (or at least those used by children of an appropriate age given the documented nature of the problem) should be subjected to equal treatment. Individual students within a targeted classroom should *not* be singled out for this form of inspection. If school officials have reason to suspect that a particular student or group of students is carrying concealed drugs or other contraband, the appropriate response is to conduct an individualized search in accordance with the standards established in New Jersey v. T.L.O..

The plan should include provisions to ensure the security of students' possessions that are left behind, protecting those possessions against the risk of theft, loss, or destruction. The plan should ensure that the movement of students during the operation is done in a safe and orderly way, and the plan should include provisions to make certain that students avoid direct contact with drug-detection animals.

In directing or controlling the movement of students pursuant to this type of inspection program, school officials should always be mindful that while schools exercise considerable authority over students for their benefit and protection, *schools are not*

prisons, and students are not inmates. (See Chapter 2.12.) The plan should thus avoid using terms that are more appropriate for correctional institutions, such as "lock-downs." Prisoners are afforded comparatively few rights under the Fourth Amendment because they have been convicted of serious crimes and have been sentenced to custodial terms. See Ingraham v. Wright, 430 U.S. 651, 657, 97 S.Ct. 1401, 1410 51 L.Ed.2d 711 (1977); Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393. School officials and law enforcement agencies must never lose sight of the fact that most students do *not* use, carry, or sell illicit drugs or dangerous weapons on school property, and that suspicionless inspection programs are designed to deter and to ferret out the comparative handful of students whose unlawful and dangerous behavior disrupts the sanctity of the educational environment. The Pennsylvania Supreme Court recently recognized that the goal of safe, drug-free schools "is often impeded by the actions of a few students which interfere with the ability of the [state] to achieve this goal." Commonwealth v. Cass, 709 A.2d 350, 364 (Pa. 1998). School officials, in their zeal to deter the dangerous and unlawful behavior of a few troublemakers, should not use tactics that serve unwittingly to breed disrespect for authority, or that unduly disrupt the educational process.

Finally, it is essential that students and their parents or legal guardians receive advance notice that the school intends to use — or at least retains the right to use — this particular inspection technique, and that students may be required without further notice to vacate a classroom and to leave their personal possessions behind so that those objects and containers can be examined by a drug-detection canine.

(3) Using Canines to Examine Vehicles Parked on School Property. In some school districts, students in upper grades are permitted to park their vehicles on school property. These vehicles, in turn, can then be used to store drugs, alcohol, weapons, or other prohibited items. As a general proposition, schools have a lesser interest in regulating (and thus in inspecting) the contents of student-owned or operated vehicles than they have with respect to the contents of lockers, desks, bookbags, or similar containers that are brought into school buildings. Even so, schools have the right to impose reasonable restrictions and conditions on student use of school-owned and maintained parking facilities. These conditions and regulations should be clearly spelled out in the student handbook and at the time that the school provides parking decals or parking permits. Specifically, students and their parents and/or legal guardians should be advised if vehicles will be subject to inspection by drug-detection canines.

The fact that schools have the authority to impose regulations concerning the use of vehicles that are brought on school property does not mean that students have explicitly or implicitly waived their rights under the Fourth Amendment. Just as schools

cannot require students to waive all of their Fourth Amendment rights as a condition of accepting a locker assignment, so too, schools cannot condition parking privileges on a blanket waiver of Fourth Amendment protections. (See the discussion of "implied consent" in Chapter 2.4.)

The courts that have addressed the issue whether scent dogs can be used to sniff vehicles consider, among other things, whether students are afforded access to their vehicles during the school day. In Jones v. Latexo Indep. Sch. Dist., 499 F.Supp. 223 (E.D. Tex. 1980), the court ruled that the use of drug-detection canines to examine student vehicles as part of a suspicionless sweep search was unreasonable and thus unlawful, in part because pursuant to school regulations, students had no access to their vehicles while school was in session. Thus, the court reasoned, "the school's legitimate interest in what students had left in their vehicles was minimal at best." Jones at 235.

Clearly, moreover, if a vehicle is not parked on school property, school officials have no regulatory authority with respect to that vehicle. Even when the vehicle is kept on school grounds, the better practice is to permit a law enforcement officer to conduct any search of the interior of the vehicle in the event of a positive alert by a drug-detection canine.

Because the examination of the exterior surface or air surrounding an object by a drug-detection canine is not a search according to most federal and state published decisions, see Chapter 4.5B, a law enforcement agency may use these animals to examine the exterior surfaces of vehicles that are parked on public property, whether on the street or in a school-owned lot. Law enforcement officers may not, however, open a door, window, or trunk to facilitate the dog's inspection. The act of opening or entering any part of the vehicle, even if the windows or a convertible top were left open, constitutes a "search" under the Fourth Amendment, and any such conduct by a law enforcement officer or by a canine that is being handled by a law enforcement officer must only be done pursuant to a warrant or a recognized exception to the warrant requirement, such as consent or the so-called "automobile exception."

The "automobile exception" to the general rule that police must obtain a search warrant provides that an officer is permitted to conduct a warrantless search of an automobile provided that the officer (1) has probable cause to believe that the vehicle contains contraband or evidence of a crime, (2) the vehicle is at least potentially mobile, and (3) the facts and circumstances that establish probable cause were unforeseeable, meaning that the officer did not know in advance that he or she would have probable cause to search that particular vehicle. In the event that an officer does have pre-existing probable cause to believe that a particular vehicle contains contraband or other evidence

of a crime, the officer is generally required to obtain a search warrant before entering the vehicle or otherwise conducting a search of its contents.

Law enforcement officers in New Jersey should also be mindful that in State v. Colvin, 123 N.J. 428 (1991), the New Jersey Supreme Court held that when police intend to search a *parked* vehicle pursuant to the automobile exception to the warrant requirement, they must, in addition to satisfying all of the above-mentioned elements, have "articulable reasons to believe that the evidence may otherwise be lost or destroyed." If such articulable reasons do not exist, a search warrant is necessary.

The Court in Colvin made clear that a warrantless search of a parked vehicle by police under the authority of the automobile exception must be done "without advance planning." As noted above, if police already have reason to focus their attention on a specific vehicle, the better practice is to secure the vehicle (i.e., watch over it to prevent anyone from entering it or driving it away) while a warrant is obtained.

If police are at all uncertain whether a scent dog's alert to a vehicle constitutes probable cause, the officer should seek the advice and direction of a judge, rather than rely on the automobile exception and conduct a warrantless search. Police officers in these circumstances are strongly encouraged to conduct some further investigation to corroborate the dog's alert before undertaking a search.

F. Summary: Special Rules And Procedures Governing The Use of Law Enforcement Canines to Conduct Suspicionless Examinations. Special rules and procedures must be followed to ensure that scent dog "sweep" inspections are conducted in a reasonable and safe manner. Many of these special rules and procedures are discussed in the preceding sections of this Chapter. It is appropriate, however, to restate these rules succinctly:

(1) Advance Notice. Because the ultimate goal is to discourage students from bringing and keeping drugs on school grounds, students and their parents and/or legal guardians should be given written notice of the intention and authority of school officials to invite drug-scent dogs to conduct suspicionless inspections on school property. The whole point of the exercise, after all, would be lost if the program were to be kept secret. This notice should refer to all places or items that might be subject to such canine inspection, such as lockers, desks, handbags/purses, backpacks, and other portable containers, outer clothing removed from students, and vehicles brought on school grounds. Notice should also be provided if students may be ordered to vacate a room and to leave behind their outer clothing or other possessions to be examined by scent dogs. The notice should make clear that school officials reserve the right to use

other drug-detection techniques in addition to scent dogs, including random locker inspections.

(2) Soliciting Parental Input. The use of drug-detection canines represents an aggressive and dramatic technique — one that is designed to attract attention and make a powerful statement. This tactic, by its nature, is controversial. School authorities and law enforcement agencies should therefore be mindful that at least in some communities, the use of police canines evokes painful memories of governmental overreaching, especially if the dogs would be allowed to touch or confront students directly. (But see ¶ 9, generally prohibiting such conduct.) In many places, in contrast, police canines have actually been used to *promote* positive relations between the police department and the community it serves. (Comparatively few drug-detection dogs were trained as or even resemble "attack" dogs or traditional police canines. Most scent dogs are friendly and affectionate.) Indeed, in many places, concerned parents have *insisted* that police dogs be brought into schools.

In view of the inherently controversial nature of this inspection technique, school officials and law enforcement agencies are strongly encouraged to solicit input from parents, teachers, and other members of the school community before conducting a canine operation. In Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 115 S.Ct. 2386, 2395, 132 L.Ed 2d. 564, 580 (1995), the United States Supreme Court found it significant that school authorities held a parent "input night" to discuss the proposed student athlete drug testing policy. The Court seemed to be especially impressed that the parents in attendance gave their unanimous approval. 115 S.Ct. at 2389. The Court concluded its opinion by noting that the "primary guardians of Vernonia's schoolchildren appear to agree" that the policy was reasonable. Id. at 2397. The Court observed:

> The record shows no objection to this districtwide program by any parents other than the couple before us here — even though, as we have described, a public meeting was held to obtain parents' views. We find insufficient basis to contradict the judgment of Vernonia's parents, its school board, and the District Court as to what was reasonably in the interest of these children under the circumstances.
> [Id.]

Even if not legally required, it is a good idea to meet with parents and to provide them with input in the decision to resort to the use of drug-detection canines, since this provides law enforcement and education officials an excellent opportunity to discuss with parents and other members of the school community the scope and nature of the

school's drug problem and the need for a comprehensive response that goes far beyond relying on drug detection-dogs.

(3) *Careful Planning.* Inspections by canines must be done in accordance with a neutral plan that minimizes the discretion of the dog handler and other police officers and school officials executing the inspection. The plan should, to the greatest extent possible, minimize the degree of intrusion and inconvenience to students and faculty members. These inspections must not be used to harass individual students or groups or associations of students.

Besides circumscribing discretion and thus protecting against the possibility that the inspection would be used improperly to target or harass individual students, the neutral plan should be carefully designed to ensure that the operation unfolds in an efficient and safe manner. Importantly, all persons involved in the planning and execution of the operation must be aware of the need to keep the operation *strictly confidential* up to the moment that the canine units begin to conduct their sweep.

As part of the planning process, a room should be set aside in the school to serve as a command center from which to coordinate all activities. This room should be equipped with telephone, facsimile, wordprocessing, photocopying, and secure two-way radio communication facilities. This command post should be staffed with both law enforcement and education officials to oversee the operation and to respond to any problems that might arise.

The school officials assigned to the command center should bring with him or her a master list of all locker assignments and parking lot assignments or list of student-owned or operated vehicles that are allowed to be parked on school property. This official should also have access to the roster of enrolled students and a list of parents or legal guardians so that they can be contacted promptly in the event that a dog alerts to a locker assigned to their child or ward.

The local juvenile officer should also be stationed at the command center. Juvenile officers are usually familiar with those students who have had previous experience with the law, and these officers can serve as an invaluable source of information in confirming or corroborating a positive dog alert.

Prior to the sweep, all canine units and support teams should be thoroughly briefed on the layout of the school, the areas that are to be inspected or "swept," and any areas that may be "out of bounds" and that should not be entered or disturbed. A

map or floor plan of the school should be provided to each team, clearly marking the areas to be inspected and the routes to be taken.

During the operation, and at all times while canines are present on school grounds, students should be restricted to their classrooms or locations that will not be swept. It is especially important to carefully control student movements during the operation, so as to ensure their safety. In order to make certain that students do not come into contact with the canines, do not observe the canines in action (so that students cannot witness a positive alert), do not interfere with or disrupt the operation, and cannot gain access to their lockers for the purpose of removing, concealing, transporting, or destroying illicit drugs or other contraband, students should not be allowed to be or walk in hallways, lockers areas, or other places to be inspected unless they are escorted by designated school personnel.

(4) Findings. School officials should carefully document their findings to demonstrate why it is necessary and appropriate to use this particular tactic. These findings should spell out the nature and scope of the problem that exists in the school and why the proposed use of drug-detection canines will help to alleviate the problem. It should be noted that because a "sniff" or "sweep" inspection by a drug-detection canine does not constitute a "search" under federal or New Jersey law, see Chapter 4.5B, school officials would not be constitutionally required to establish "reasonable grounds" to believe that drugs would be detected and seized before they may invite law enforcement officials to bring a canine into a school to inspect the exterior surface of lockers or desks. Compare Commonwealth v. Cass, 709 A.2d 350 (Pa. 1998) (under the Pennsylvania Constitution, school officials must establish reasonable grounds to justify the use of drug-detection dogs). Even so, the better practice is to make a careful and thorough record of the circumstances that make the use of this tactic appropriate. See Chapter 4.4A for a list of relevant facts and circumstances that would justify a general locker inspection program. Note also that where the canine inspection program contemplates the temporary "seizure" of student belongings that are not stored in lockers, see Chapter 4.5E, school officials may be required as a matter of constitutional imperative to document the reasons that would justify ordering students to vacate classrooms and to leave their possessions behind to be inspected by drug-detection canines.

(5) Subterfuge. Suspicionless or "sweep" canine inspections must never be used as a pretext or subterfuge to conduct searches of lockers or other places where there is a particularized suspicion that drugs or other contraband would be found therein. This does not mean, however, that police are precluded from using drug-detection canines as an investigative technique to inspect targeted lockers or other property for the

purpose of corroborating a pre-existing suspicion and to establish probable cause to apply for a warrant to search a locker or other container.

(6) County Prosecutor Approval. The county prosecutor, as the chief law enforcement officer in the county, or the Attorney General, through the Director of the Division of Criminal Justice, must approve any use of a drug or explosive-detection canine to conduct a suspicionless or "sweep" examination a school, whether public or private, even if the canine(s) is owned and operated by another law enforcement agency, such as a sheriff's office, municipal police department, or the New Jersey State Police. There are only two exceptions to this general rule requiring county prosecutor or Attorney General prior approval: (1) the canines are mustered on an emergent basis to search for explosives in response to a credible bomb threat, or (2) drug-detection dogs are used solely to perform a "demonstration" in an assembly.

The county prosecutor or the Director of the Division of Criminal Justice, or their designee, must review and approve the operational plan, which should be in writing. This approval procedure is patterned after the current practice concerning search warrant applications. (Pursuant to Attorney General directive, no law enforcement officer may apply to a Municipal or Superior Court Judge for a search warrant without first obtaining the approval of an assistant prosecutor, deputy attorney general, or assistant attorney general.)

If the county prosecutor or the Director of the Division of Criminal Justice rejects the plan, the use of a drug-detection canine in a school is prohibited. Prosecutors should carefully consider the specifics of the plan and should also anticipate the reaction to the operation by the school community and the community-at-large. (See ¶ 2.)

(7) Approval and Veto Authority of School Officials. No drug-detection canine may be brought on school grounds to conduct a suspicionless or "sweep" examination without the express prior approval of the appropriate education officials (i.e., the school board, district superintendent and/or the building principal). Preferably, the request to use drug-detection canines should be initiated by school officials. Nothing in this Manual should be construed, however, to prohibit a law enforcement agency from soliciting an invitation, or from otherwise offering this service to school officials. The county prosecutor should not approve the operation or allow it to proceed if there appears to be a significant dispute within the educational hierarchy. Ordinarily, it is expected that the operation will have been approved by the local board of education, school district superintendent, ***and*** building principal. (Note, however, that the board of education need ***not*** approve the exact date and time of the operations, and should not be advised as to the exact date and time when inspections will occur. As a general

proposition, and in order to ensure secrecy, the number of people aware of the exact time of these planned operations should be kept to an absolute minimum.)

Furthermore, school officials have an absolute right at any time to withdraw the invitation (whether before or during the course of an ongoing suspicionless inspection), in which event the inspection must immediately cease and the dog be immediately withdrawn from school property. For reasons of security, some school districts have chosen to provide blanket permission to a law enforcement agency to bring drug-detection dogs on to school property with little advance notice to school officials as to the actual time of the inspection. While this procedure is entirely appropriate, it is critical to note that school officials are ultimately responsible for ensuring that the operation causes minimal disruption to the educational environment and to previously-scheduled school activities. By way of example, a law enforcement agency may not be aware that high school proficiency testing or other sensitive activities are taking place on the day of the proposed drug-dog inspection that would make it inappropriate to undertake the operation.

It also bears noting that the above-stated rule that school officials have the absolute right to postpone or terminate a drug-dog sweep inspection does not mean that school officials may prevent or impede the use by law enforcement of a drug- or explosives-detection dog to conduct a particularized search (as opposed to a suspicionless "sweep" inspection) to corroborate a pre-existing suspicion that drugs or explosives would be found in a given place. Although the Memorandum of Agreement Between Education and Law Enforcement Officials (1992) contemplates cooperation between education and law enforcement authorities, school officials must not interfere with ongoing criminal investigations. (See Chapter 14.5 of this Manual for a more complete discussion of the appropriate procedures for resolving disputes between educators and law enforcement agencies.)

(8) *Notice to Local Police.* The local police department, if not otherwise directly involved in the drug-detection dog operation, should be provided with sufficient notice to enable the department to plan for and respond to any disturbance that might result from the operation. As noted in ¶ (2), when electing to use this tactic, careful consideration must be given to the anticipated reaction of the school community and the community-at-large.

(9) *No Contact Between Canines and Students.* The operational plan must include provisions to ensure that drug-detection dogs do not come into direct contact with students. Such contact or confrontations can not only disturb the animal's concentration, leading to false positive and negative results, but also poses an

unnecessary risk to the safety and well-being of students. Furthermore, it is inappropriate for children to be present during the course of an actual sweep search because a positive alert may subject the student whose property was identified to ridicule and stigma. (Recall that searches should generally be done in private and not in the presence of the general student body. See Chapter 2.8.) Notwithstanding the foregoing, direct contact between the canine and students is permitted during the course of a controlled "demonstration" of the drug-detection dog's abilities, provided that the handler is certain that the dog will not attack or frighten children witnessing or participating in the simulated demonstration, and further provided that the dog only makes direct contact with or examines students who have volunteered or otherwise agreed to participate in the demonstration.

(10) *Procedures to Expedite Approval of Search Warrant Applications.* The county prosecutor's office should take steps to facilitate the process of obtaining search warrants in anticipation that the drug-detection dog will alert to the presence of illicit substances. (See also ¶ (3).) A judge, preferably a Superior Court Judge, should be advised of the operation and should be standing-by to review search warrant applications. Provisions should be made to make a prompt, in-person appearance before the judge (as opposed to a telephonic application) to present the facts establishing probable cause. The track record of the animal, including a complete record of the canine's training and proficiency, should be fully documented and preferably should be stored in a word processing system so that a written search warrant application can be quickly prepared, sworn to, and presented to the judge for review and approval. In addition, an assistant prosecutor or deputy or assistant attorney general should be on the scene to personally review and approve the warrant application before it is submitted to the judge. Finally, school officials should have on hand a master list of locker assignments so that the identity of a student whose locker was alerted to can be quickly determined and included in the warrant application. (Note that in some cases, drugs will be stored in lockers that are supposed to be vacant and that have not been officially assigned to a student.)

(11) *Minimizing Disruption.* Steps should be taken to minimize the disruption of the educational environment. Law enforcement officers must at all times respect and defer to school officials as to the timing and conduct of any operation involving a suspicionless inspection by drug-detection canines. Some school officials may prefer that the dog be brought on to school grounds during the school day to enhance the visibility of the operation and to send a strong message to students. Other school administrators, however, may prefer that the inspection of lockers by scent dogs occur after school hours when children are not present. The law enforcement agency providing the drug-detection services should defer to school officials on this decision. (Recall also that with

respect to suspicionless sweep search by canines, school officials retain the right to cancel, suspend, or terminate the operation.)

Where feasible, and to the greatest extent possible, students should be permitted to remain in class to perform their customary work during the operation. If students are required to vacate a classroom, this should be done in an orderly way. If classrooms are to be inspected or "swept," each room should, where feasible, be evacuated in a manner that allows students and teachers to continue to perform their customary work for as long as possible during the course of the schoolwide operation.

In some cases, a "ruse" is used to get students to vacate a particular classroom. Ostensibly, this tactic is justified on the theory that students who are carrying drugs will simply refuse to abandon their contraband if they are told to leave their possessions behind as part of a canine drug-detection inspection. On a few occasions, a fire drill has been used to bring students out of the building so that drug-detection animals can be brought in.

Without question, the act of setting a "false" alarm seriously disrupts, indeed suspends, the educational process. Under no circumstances should a law enforcement agency activate a fire alarm in these circumstances except under the direction of the school building principal or other appropriate school official. Nor should a law enforcement officer direct or insist that school officials use this tactic to get students to vacate classrooms. Needless to say, however, the general prohibition against disrupting the educational environment that is established by Attorney General Directive and that is memorialized in the Memorandum of Agreement Between Education and Law Enforcement Officials (1992) is directed to law enforcement authorities, not to school officials. Accordingly, school officials are, of course, free to periodically test the fire alarm system and evacuation procedures by conducting unannounced "fire drills." See N.J.S.A. 18A:41-1.

In sum, police, acting unilaterally and in the absence of a bona fide emergency, should never order students out of their classrooms. However, the police, working in cooperation with school officials, are permitted to take advantage of a fire drill that was initiated by appropriate school officials, even if the evacuation was intended to facilitate a school-wide inspection of classrooms by drug-detection canines.

(12) Alerting News Media. Representatives from the news media should not be invited to observe an actual search of a locker or a student's belongings in circumstances where the identity of the student may be revealed. It is understandable that school officials might want to publicize the inspection event as a means of making a statement

about the school district's resolve to create a safe, drug-free environment, and as a means to enhance the deterrent effect of the operation. By the same token, media attention and scrutiny can be used to show that the inspection was indeed conducted in accordance with the neutral plan and in way that respects students' legitimate expectations of privacy.

Even so, in order to minimize the intrusiveness of the inspection episode, it is important that searches occur in private, so as to reduce any stigma that might be associated with a positive canine alert or the actual discovery of illicit drugs or other contraband. (Recall that the only legitimate purpose of a search is to find evidence, *not* to embarrass, expose to ridicule or peer condemnation, or otherwise punish a student who has violated the law or school rules. Any discipline imposed as a result of the discovery of contraband in a search must be done in accordance with rules and regulations promulgated by the State Board of Education.)

The New Jersey Code of Juvenile Justice includes specific provisions that are designed to make certain that investigations (and the results of investigations) involving alleged acts of delinquency committed by minors are kept confidential, and are only made public in limited and appropriate circumstances. See N.J.S.A. 2A:4A-60, which provides that records of courts and law enforcement agencies pertaining to juveniles charged as delinquent "shall be strictly safeguarded from public inspection." Permitting media representatives to witness ongoing investigations where the identity of a juvenile suspect might be revealed (or where the juvenile suspect is present so that his or her face is visible to media representatives even if school officials do not disclose his or her name) runs afoul of the spirit if not the letter of New Jersey's juvenile offender confidentiality laws.

Finally, it should be noted that aside from any concerns relating to confidentiality and privacy invasions, it is inappropriate, for practical reasons, to permit news media representatives, members of the general public, or members of the school community to witness any search episode where the person who is the subject of the search is present. One of the practical reasons for conducting searches or seizures in private is to eliminate any incentive or perceived need for a student to resist the search in order to "show off" or display anti-authoritarian machismo in front of peers and classmates. Such confrontations pose an unnecessary risk of physical injury to students, school officials, law enforcement officers, and bystanders, especially if school officials or police officers are required to use escalating force to overcome the resistance, or if the resistance provokes a civil disturbance involving spectators. It would also be highly inappropriate to permit a student who is suspected of having committed a serious offense involving drugs or weapons to "play" to a television camera.

(13) *Public Awareness Follow-Up.* In addition to soliciting parental input before conducting a canine operation, see ¶ (2), one or two weeks after a sweep operation is completed, the county prosecutor and school superintendent are strongly encouraged to hold a public awareness seminar at each school where the operation was conducted. These public meetings should be cosponsored by law enforcement and education officials. Parents as well as students should be invited to attend and to actively participate in the discussion. Where appropriate, the seminar should be held in the evening so as to make it possible for the greatest number of parents to attend. (If necessary, a separate seminar or assembly should be held for students during regular school hours.)

These meetings will not only enhance the deterrent effect of the operation, but will also give education and law enforcement professionals an opportunity to discuss with parents the nature and scope of the substance abuse problem in the school, and to describe the results of the sweep operation. (Of course, any such discussion must comply with the confidentiality provisions of the Code of Juvenile Justice; the identity of individual students whose lockers were found to contain drugs should not be revealed. It would, however, be appropriate to discuss the procedures that were used to deal with any students who were found to be in possession of illicit drugs or other contraband.)

During these meetings, the county prosecutor could arrange to demonstrate the capabilities of the canine(s) that were used in the actual sweep operation. Assistant prosecutors and narcotics detectives should also be available to answer questions from the audience. Most importantly, these public meetings should be used to discuss the substance abuse prevention, awareness, and counselling services available in the district to help children who abuse alcohol or other drugs, or who are at risk of abusing substances. This is consistent with the Governor's Drug Enforcement, Education and Awareness Program, which calls for a parent outreach campaign to enlist the support of PTAs, PTOs, municipal alliances, and civic and fraternal organizations to address some of the myths and misconceptions concerning present day drug use, including the so-called "it's not my kid" syndrome.

Finally, these follow-up public meetings should be used to solicit parental input and approval concerning the continued use of canine sweeps in schools. These seminars provide an invaluable opportunity to show how the operation was planned and executed, what steps were taken to ensure the safety of students, to consider whether, on balance, the operation was successful, and whether similar operations should be conducted in the future and, if so, how often they should be conducted.

4.6. Metal Detectors.

A. General Considerations. In some schools, officials have deemed it necessary to use metal detectors to discourage students from bringing firearms, knives, and other metal weapons on to school grounds. The use of metal detectors is now common in airports, courthouses, and other public buildings across the state and nation.

There are essentially two distinct types of metal detection equipment: stationary magnetometers that are strategically placed at entrances and through which students or visitors must pass; and portable, hand-held devices or "wands" that can be used to scan student clothing and packages. Often, the two types of detectors are used in conjunction with one another, since each performs a slightly different function. Both types of metal detectors are used as screening devices to determine whether a further physical search is appropriate. The use of metal detectors thus serves to reduce the number of persons who are subject to a physical "search," as that term is used in this Manual. Presumably, those who do not activate a metal detector would not be subject to any further delay or intrusion.

At one time, legal scholars argued that metal detectors can be used at airports without running afoul of the Constitution because travellers have the option not to board an airplane and thus can avoid passing through a magnetometer. This legal argument is dubious, and, in any event, would not seem to apply with respect to metal detectors that are located in courthouses, since many of the persons required to pass through them have been subpoenaed to appear in court and do not have the option simply to stay out of the courthouse.

More recently, courts have chosen to characterize the use of metal detectors as a type of warrantless "administrative" search. Using this analysis, "consent" is hardly necessary. In Downing v. Kunzig, 454 F.2d 1230 (6th Cir. 1972), the court upheld a regulation requiring all persons entering a federal courthouse to submit to a search of their briefcases and packages for weapons without even discussing the issue of consent, and in People v. Dukes, 151 Misc.2d 295, 580 N.Y.S. 2d 850 (N.Y. Crim. Ct. 1992), the court upheld the use of metal detectors in a school in Manhattan, noting that the issue of consent has little application in the context of schoolchildren. "After all," the court in Dukes observed, "children are required by law to attend school. To allow students to walk away upon activating a scanning device would only encourage truancy: students not wishing to go to school that day could simply place metal objects in their pockets." 580 N.Y.S.2d at 853.

The better argument for permitting the use of metal detectors in schools, therefore, is simply that these devices pose only a minimal intrusion on any protected privacy rights, and that this minimal intrusion is more than outweighed by the need to detect the presence of firearms and other metal weapons. Arguably, the use of a magnetometer to scan the outer clothing or a container carried by a student for dense metal does not constitute a "search" within the meaning of the Fourth Amendment or Article I, Paragraph 7 of the State Constitution precisely because these examinations intrude only slightly on protected privacy interests. As noted in Chapter 4.5B, the United States Supreme Court has ruled that the use of drug-detection canines does not constitute a traditional "search" because canines cannot react to any non-contraband items in which private citizens may have a protected privacy interest. This argument would also seem to apply to metal detectors, although it must be noted that these devices will react to any dense metal, and not just to objects that are weapons or that are otherwise prohibited by law or school rules.

In Interest of F.B., 658 A.2d 1278 (Pa. Super. 1995), allocatur granted 666 A.2d 1056 (1995), a Pennsylvania court sustained the use of both metal detectors and handbag searches at a Philadelphia high school under both the Fourth Amendment and the Pennsylvania State Constitution, which had been construed to require a particularized suspicion of wrongdoing before drug-detector dogs could be deployed. (See discussion of Commonwealth v. Johnson and Commonwealth v. Cass in Chapter 4.5B.) The court in F.B. thus impliedly found that the degree of intrusion caused by a metal detector is less than that occasioned by a canine sniff. In any event, the court concluded that, "the school's interest in ensuring security for its students far outweighs the juvenile's privacy interest." 658 A.2d at 1382. Accord Interest of S.S., 680 A.2d 1172 (Pa. Super. 1996).

In determining whether to deploy metal detectors, school officials should note that the effectiveness of these devices depends to a large extent on the ability of school officials to maintain security at all entrances to the school building. Because it is often not possible to prevent students who are bent on bringing weapons into the school from using unauthorized (and unprotected) means of access to school buildings, to some extent, the use of metal detectors serves as a symbolic as well as practical response to the problem. It is hardly inappropriate, however, for school officials to send a clear message that they are taking affirmative steps to discourage students from bringing weapons on to school grounds.

School officials should nonetheless carefully consider whether the deployment of metal detection devices is a cost-effective response to the school's security problem. These devices are expensive to purchase. In addition, school employees must be

dedicated to operate them and to conduct inspections as appropriate when a device alerts. Experience in some communities has shown, moreover, that these devices provide only a temporary and perhaps even false sense of security. As noted above, law-abiding students may soon discover that their classmates who are bent on bringing weapons into the school are able to use unauthorized means of access to evade the metal detection stations. This, in turn, can undermine student confidence in the ability of school authorities to maintain appropriate order and discipline.

Before deploying metal detectors, school officials should consider whether there are other alternatives to deter students from trying to bring weapons into school buildings. School officials should nonetheless be mindful that modern firearms and other dangerous weapons are compact and easily concealed, and that given the significant restrictions imposed on the legal authority and practical ability of school officials to conduct searches (see, e.g., Chapter 10 discussing the recently enacted prohibition on strip searches), metal detectors can in some settings serve as a useful adjunct to other procedures that are designed to protect the safety and security of the school environment.

Even so, before deploying metal detectors in particular school buildings or school districts, school administrators are encouraged to make specific findings why it is necessary and appropriate to use this particular technique to deter students from bringing weapons on to school grounds. School officials, for example, should be prepared to point to particular incidents involving weapons possession by students, or to a developing pattern of weapons usage, presence, or availability. By carefully documenting their findings, school officials will not only be in a better position to make a reasoned judgment as to the cost-effectiveness of purchasing or renting metal detectors, but will also be able to provide a more suitable record that can be used to defend the use of metal detectors in any court challenges that might arise.

B. The Role of Police at Security Stations. It is not certain whether the same metal detector rules would apply if a security station at a point of entry is manned by a police officer rather than a non-sworn security guard or school staff member. (Note that the definition of "law enforcement officer" in this Manual would not only include municipal police who are assigned to schools as their post or as "school resource officers," but also includes sworn officers employed by school districts pursuant to N.J.S.A. 18A:6-4.2 et seq. See Chapter 1.5E.) In most other search and seizure contexts, the active or even passive participation of a sworn law enforcement officer would convert the search episode into a law enforcement activity that would be subject to the stricter search and seizure rules governing police. In the context of the use of metal detectors (and point-of-entry inspection discussed in Chapter 4.7, infra), however,

it is not uncommon for law enforcement officers to be directly involved, especially at courthouses, and their participation does not appear to invoke a stricter standard of review.

In In Interest of F.B., 658 A.2d 1378 (1995) allocatur granted, 666 A.2d 1056 (1995), a Philadelphia high school student was subjected to a metal detector scan and bag search by police officers who were employed by the school district. Upon entering the school, students were led to the gymnasium where they would be ordered to empty their pockets, surrender their jackets and bags, and submit to being scanned by metal detectors. The appellant emptied his pockets and discarded a Swiss-type folding knife, whereupon he was escorted to a holding room and arrested for possessing a weapon on school property.

The Pennsylvania court held that the student's rights had not been violated, and the court drew no distinction between such inspections conducted by police officers and those conducted by non-law enforcement school district employees. (In fact, the court in its legal analysis made no mention of the employee's status as a police officer.)

It would thus appear that police may participate in the implementation of an in-school metal detector policy. The key is that whoever is manning the metal detection or point-of-entry security stations must follow uniform procedures set forth in a neutral plan so that there is little or no discretion in selecting students for inspection. See Chapter 4.6D. (In the F.B. case, every student would be searched until the gymnasium becomes too crowded "at which time school administrators [would] randomly select students to be searched." 658 A.2d at 1380. The court did not address the issue whether this "random" selection process impermissibly subjected students to the discretion of school administrators because the student found in possession of a knife in that case had not been randomly selected.)

C. Advance Notice. One of the most important means to minimize the degree of intrusion caused by the use of metal detectors is to provide advance notice to students and their parents and/or legal guardians. In addition to providing notice to all enrolled students by means of publication in the student handbook, written warning notices should be posted conspicuously at the entrances of the school so as to provide notice to visitors that they will be subject to this form of inspection.

Although enrolled students below a certain age are required by law to attend school and, thus, unlike visitors, do not have the option simply to avoid passing through a metal detector, providing advance notice gives students an opportunity to remove dense metal objects other than weapons that might activate the devices and that, if

revealed in a subsequent search, might prove embarrassing, or that might trigger a physical search that would reveal non-metal objects, the discovery of which would prove embarrassing.

D. Neutral Plan in Selecting Students for Metal Detector Inspection. Appropriate school authorities should develop a neutral plan that carefully limits the discretion of school employees who operate metal detectors and that provides a very "detailed script" for these employees to follow as they search for weapons. See People v. Dukes, supra, 580 N.Y.S.2d at 852.

Preferably, the plan should be in writing. In Interest of F.B., 658 A.2d 1378 (Pa. Super. 1995), allocatur granted, 666 A.2d 1056 (1995), the court sustained a metal detector and bag search policy that was not reduced to writing only because the court was satisfied that there were "other safeguards" present, namely, that the officers who conducted the student searches "followed a uniform procedure ... . This uniformity served to safeguard the students from the discretion of those conducting the search." 658 A.2d at1382. Even so, the court commented that it would have been "prudent" for the school district to have issued written guidelines.

Although it is best to require *all* students entering the school to submit to examination by a metal detector, the neutral plan may authorize security personnel or other school employees assigned to a metal detection station to limit the number of students examined by using a random formula. This principle was succinctly described by the court in People v. Dukes when it noted that:

> For example, if lines become too long, the [school security] officers may decide to search every second or third student. The officers are prohibited, however, from selecting a particular student to search unless there is a reasonable suspicion to believe that the student is in possession of a weapon.
> [580 N.Y.S.2d at 851.]

It must be noted that any such method of selection is not really random in a strict mathematical sense, since students are likely to be able to determine the pattern of selection (i.e., searching only every other or every third student in line) and thus they can tamper with the selection process. In this way, a student carrying a concealed weapon may be able to manipulate his or her position in line so as to evade the metal detector inspection.

Special precautions should be taken with respect to the use of hand-held metal detectors or "wands," which are far more versatile than stationary units. These portable devices can be used in a number of applications, including (1) to conduct initial "sweep" inspections of students and their property as they enter the school building, (2) to verify and focus on the specific location of metal that was detected by a stationary walk-though unit, or (3) to examine the clothing or property of specific students who are suspected to be carrying concealed weapons. However these portable metal detection devices are used, it is important that school officials develop a neutral plan that guards against the arbitrary exercise of discretion. (As noted above, the best means of protecting against arbitrary discretion is simply to ensure the even-handed application of metal detectors to all students, visitors, and hand luggage entering the school.)

When metal detectors are used to scan students who are already in the school building (i.e., at locations other than points of entry), care must be taken to ensure that students are not subjected to unreasonable inspections. Even though a metal scan may not constitute a full-blown "search" for Fourth Amendment purposes, it is strongly recommended that individually selected students not be scanned unless school officials have some articulable suspicion that the student being examined may be carrying a weapon.

In determining whether to subject a specific student to a metal detection scan, school officials may consider whether the student is known to be a member of a gang or group that frequently carries or resorts to the use of firearms or other deadly weapons. Membership in a gang, in other words, is a legitimate fact that school officials may consider as part of the totality of the circumstances in determining whether there is a factual basis to conduct a metal detection inspection of a specific student suspected of carrying a weapon. It is less clear, however, whether a student can be subjected to a suspicion-based examination by a metal detector based *solely* on his or her affiliation with a gang. In any event, metal detectors may *never* be used to harass or single out students based upon their race on ethnicity.

E. What To Do When a Device Alerts. In addition to providing advance notice, there are other steps that school officials should take to minimize the degree of privacy intrusion whenever metal detectors are deployed. For example, if the metal detector is initially activated, the student should be provided with a second opportunity to pass through the device to determine whether there was an error, rather than immediately subjecting the student to a more intrusive form of physical search. Similarly, where feasible, a hand-held metal detector could be used to conduct a more focused inspection to verify and isolate the presence of metal that was detected by a

walk-though magnetometer. This technique might show, for example, that the walk-through device alerted to the student's belt buckle, thus obviating the need to conduct a search of the student's person or belongings. The hand-held devices use changing audible signals that can be interpreted by the operator, in contrast to the stationary metal detectors that essentially provide only a positive or negative reaction to the presence of metal objects.

Similarly, procedures should be in place so that the contents of student's hand luggage can be examined separately from the student's person or clothing. This technique will allow school security personnel or hall monitors to identify the object(s) that activated the metal detector's alarm, thus allowing any subsequent search to be limited to those containers. It would be unnecessary and inappropriate to conduct a physical search of a student's person (i.e., clothing) when it is possible to determine by means of a hand-held detector that the metal alerted to by a stationary unit is located in a handbag or backpack being carried by the student.

Needless to say, school officials in designing and implementing a metal detection program must carefully balance the need to be thorough in reacting to metal detector alarms, as against the need to permit students to enter the school building in an efficient and orderly manner.

Most importantly, school officials responding to a metal detection alarm should be instructed to limit any search (i.e., opening of a container carried by the student) to that which is necessary to detect weapons. This minimization can be accomplished in two distinct ways. First, where a hand-held device is used, any search or "patdown" must begin in the precise area or part of the student's person where the scanning device was activated. See People v. Dukes, supra, 580 N.Y.S.2d at 852.

Second, and even more importantly, the school official should, where at all feasible, request the student to indicate what metal object may be causing the alert, and should give the student the opportunity to remove that object for visual inspection. (Note that this does ***not*** constitute a "strip search" even if the student must reach into his or her own undergarments to retrieve the object. See Chapter 10.) This allows the student to minimize the intrusiveness of the search by making it unnecessary for school officials to peer inside or rummage through a backpack or bookbag. (Recall that "peeking," "poking," or "prying" constitutes a full-blown search under the Fourth Amendment.) Once the student has identified and removed the object that may be causing the alarm, he or she should be allowed to proceed a second time through the metal detector to determine whether, in fact, that object was responsible for activating the alarm.

If the student is unable or unwilling to identify or remove the metal object that triggered the alarm, school officials would be authorized to conduct a limited inspection of the student's property, or a limited "patdown" or "frisk" of the student's *outer clothing*, for the purpose of identifying a potential weapon. As noted above, reasonable efforts should be made to determine whether the metal that caused the alarm is located in a container being carried by the student, as opposed to an object concealed in the student's clothing. Any physical touching of the student should be conducted with a view toward minimizing the degree of intrusion, and ordinarily, the student should first be given the opportunity to remove metal object(s) on his or her person. Conducting a physical "frisk" or "patdown," in other words, should only be used as a means of last resort, and, where a hand-held scanner was used, any physical touching or patdown must be limited to the precise area of the person's clothing where the detector alerted to the presence of dense metal. (School officials are strongly urged to read and comply with the provisions of Chapter 10 of this Manual before conducting any search of a person in response to a metal detection alert.)

School officials must be especially cautious in touching a student's crotch area or female breasts. Unfortunately, in some jurisdictions, notably Los Angeles, firearms and other dangerous weapons are routinely concealed in these areas precisely because weapons-carrying students know that school officials are generally reluctant to conduct a thorough "frisk" that would entail a tactile probe of the outer clothing that covers these private parts of the human anatomy. To some extent, baggy, oversized trousers became popular with gang members precisely because such clothing makes it easier to conceal weapons. If school officials determine that this is a serious problem in their school building or district, it might be appropriate to invest in hand-held scanners that can be used to determine whether weapons are concealed in the crotch area without having to actually touch a student's clothing. These hand-held detectors will also indicate when it is not necessary to search at all for a weapon concealed in the crotch area.

Under no circumstances may a school official rearrange a student's clothing, or order a student to rearrange his or her own clothing, so as to reveal or expose to view the student's undergarments. This constitutes a "strip search" and is flatly prohibited by a recently-enacted statute. (See Chapter 10.2 for a more complete discussion of the prohibition against strip searches.)

The New Jersey legislature has expressly authorized public and private school employees to use as much force as is reasonable and necessary to obtain possession of weapons or other dangerous objects that are on the person or within the control of a student. See N.J.S.A. 18A:6-1. Even so, as a matter of rudimentary common sense,

school employees should *never* attempt to wrest a weapon away from a student, since this exposes the employee, the student, and innocent bystanders to an unnecessary risk of injury. The correct response in the event of a confrontation would be to call the police! Note that teachers and other school officials are not required by law or regulation to take a gun or other dangerous weapon away from a student. If a school official learns by any means that a student is carrying a firearm, the official should call the police immediately.

The fact that a metal detector has alerted to the presence of dense metal may provide reasonable grounds to conduct a full-blown search of the student or student's property, especially if the student is unable or refuses to remove the metal object to demonstrate that it is not a firearm or other type of weapon. Any such search should be conducted in accordance with the standards described in Chapters 3 and 10. Furthermore, if during the course of a lawful search of student property for weapons a school official observes (or smells) an item believed to be another form of contraband, such as drugs, then the school official would at that point have reasonable grounds to conduct a full-blown search for that evidence and to remove that object. (See Chapter 11 for a more detailed discussion of the "plain view" doctrine.)

Finally, in the event that a school official finds a firearm or other deadly weapon, the school official must comply with the offense reporting and referral procedures specified in N.J.A.C. 6:29-10.5, and described in more detail in Chapter 14.1.

4.7. Point of Entry/Exit Inspections.

In some school districts, school authorities require students to open their bookbags and knapsacks for cursory inspection by a security officer or other school employee before they are allowed to enter the school building. Sometimes, these suspicionless inspections are conducted in conjunction with the use of metal detectors. In addition, a number of schools require students to open their handbags and knapsacks for inspection before leaving the library or media center. This is done to discourage students from removing library books and other materials without proper authorization.

Requiring all students to submit to this form of search represents a somewhat greater intrusion on privacy interests than does the use of metal detectors, since this technique permits school officials to look inside closed containers. While more intrusive, this procedure can serve as a useful means to discourage students from bringing drugs and other non-metallic contraband that could not be revealed by a metal detector.

It is not clear whether participation by police officers at these inspection sites will affect the constitutionality of a point-of-entry inspection program. Some school districts

employ police officers pursuant to N.J.S.A. 18A:6-4.2 et seq., and it is becoming more common for police departments to detail their officers to schools to assist in maintaining security. Although there seems to be no published case discussing this specific issue, and despite the fact that New Jersey courts are especially sensitive to the potential for law enforcement agencies to manipulate civil authorities in order to further criminal investigations and prosecutions, see discussion in Chapter 4.5D(4)(a) and (b), it would seem that the presence or even active participation of a sworn police officer in manning a point-of-entry inspection site would not so transform the purpose or nature of the program as to render unconstitutional a policy that otherwise would not be unconstitutional if only non-law enforcement school personnel were involved. These issues are discussed in more detail in Chapter 4.6B concerning the use of metal detectors (which are often used in conjunction with point-of-entry visual inspections). Ultimately, the constitutionality of these programs will depend not on whether the inspection sites are staffed by sworn or non-sworn personnel, but rather on whether there are adequate safeguards to ensure that uniform procedures are followed and that serve to limit the discretion of officials in the field in selecting students for inspection.

As with metal detectors, it does not matter that students cannot, in most circumstances, be said to have expressly or impliedly consented to these inspections by reason of their electing to enter the school, since children below a certain age are required by law to attend classes. Compare People v. Dukes, 580 N.Y.S.2d 850, 853 (N.Y. Crim. Ct. 1992) (noting that the issue of consent has little relevance in the context of schoolchildren). (Note, however, that the implied consent theory would seem to be more relevant and persuasive where a student enters a school building or other school property (or property being used by the school) to attend a non-compulsory extracurricular event, such as a dance, prom, concert, or after-hours sporting event.) Even so, point-of-entry inspections are often reasonable and thus do not violate the Fourth Amendment.

While requiring a student to open a closed container for inspection clearly constitutes a "search" for purposes of the Fourth Amendment, this conduct is permissible provided that school authorities follow certain rules that are designed to minimize the discretion of school employees in determining which students are subject to this form of inspection. In addition, school officials must take certain steps to minimize the degree of intrusion to the greatest extent possible.

One of the most important safeguards is to provide students with advance notice as to when and under what circumstances they will be required to submit to this form of search. Accordingly, school officials should provide all students and their parents and/or legal guardians with written notice prior to the school year that these security

procedures will be implemented. In addition, notice should be provided to visitors by means of posting warning signs at points-of-entry to the school where these inspections will be conducted.

School officials are strongly encouraged to make specific findings to explain why this particular security technique is deemed necessary to discourage students from bringing prohibited items, including, but not limited to, drugs and weapons, on to school grounds. For example, school officials should point to particular incidents involving drug use and distribution and weapons possession by students, or to a developing pattern of security problems. Such findings would provide a record that would allow a reviewing court to balance the legitimate interests of the school in maintaining security, order, and discipline as against the privacy interests of students and visitors.

In many respects, the legal issue implicated by the use of this inspection technique are similar to the legal issues discussed in Chapter 4.4 concerning random locker inspections. Accordingly, before instituting a point-of-entry inspection policy, school officials should develop a neutral plan that complies with all of the requirements and recommendations spelled out in Chapter 4.4C.

The best means of protecting against arbitrary discretion is to ensure the even-handed application of the policy to all students and visitors entering the school. Courts have noted in the context of police roadblocks that the use of fixed checkpoints at which *all* persons are stopped and questioned creates less concerns and anxiety than selective random stops, and also eliminates the potential abusive exercise of discretion. See Desilets v. Clearview Reg'l Bd. of Educ. 265 N.J. Super. 370, 379 (App. Div. 1993). Furthermore, by subjecting everyone to this form of intrusion, there is no stigma attached to the search. Id. at 381.

If for any reason it is not possible to search every student entering the building, or if the lines become too long, school officials may choose to limit the number of students who searched by using a random formula. For example, school security personnel may decide to search every second or third student. If this is to occur, it must be done in accordance with the neutral plan developed in advance by appropriate school authorities. The plan, in other words, should specify when and under what circumstances school employees assigned to an inspection station are authorized to permit randomly selected students to enter without having to submit to a search. (Note that this method of selection is not really random in a strict mathematical sense since students are likely to be able to determine the pattern of selection (i.e., searching only every other or every third student in line) and thus tamper with the selection process. In this way, a student carrying a weapon or other contraband may be able to manipulate

his or her position in line so as to evade a search). See also the discussion in Chapter 4.6C concerning a similar drawback with respect to the use of metal detectors.

Under no circumstances may this selection technique or any type of point-of-entry inspection be used by any school employee as a ruse or subterfuge to search students who are suspected to be carrying drugs or weapons. Any such individualized search must be conducted in accordance with the "reasonable grounds" standard established in New Jersey v. T.L.O. and spelled out in Chapter 3.